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No. 86-381-CSX  
Status: GRANTED

Title: California, Petitioner  
v.  
Superior Court of California, San Bernardino County  
(Richard Smolin and Gerard Smolin, Real Parties in  
Interest)

Docketed:  
September 2, 1986

Court: Supreme Court of California

Counsel for petitioner: Jibson, J. Robert

Counsel for respondent: Riordan, Dennis P., Snell, Karen Leig

Entry	Date	Note	Proceedings and Orders
1	Sep 2 1986	G	Petition for writ of certiorari filed.
2	Oct 2 1986		Brief amicus curiae of Alaska, et al. filed.
3	Oct 8 1986		DISTRIBUTED. October 31, 1986
4	Nov 3 1986	F	Response requested.
5	Nov 4 1986	X	Brief of respondent Richard & Gerard Smolin in opposition filed.
6	Nov 12 1986		REDISTRIBUTED. November 26, 1986
7	Dec 1 1986		Petition GRANTED. *****
8	Jan 15 1987		Brief of petitioner California filed.
9	Jan 15 1987		Joint appendix filed.
10	Jan 29 1987		Record filed.
11	Feb 21 1987		Brief of respondent Richard & Gerard Smolin filed.
12	Feb 20 1987		Brief amicus curiae of CA Attorneys for Criminal Justice, e al. filed.
13	Mar 13 1987		CIRCULATED.
14	Mar 11 1987		SET FOR ARGUMENT. Wednesday, April 22, 1987. (1st case)
15	Apr 22 1987		ARGUED.

86-881  
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No. 86-

Supreme Court, U.S.  
FILED

SEP 2 1986

IN THE SUPREME COURT OF THE UNITED STATES  
JOSEPH F. SPANIOL, JR.  
CLERK

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, FOR THE COUNTY OF  
SAN BERNARDINO,

Respondent,

RICHARD SMOLIN and GERARD SMOLIN,

Real Parties in Interest.

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PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

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140 pp

QUESTION PRESENTED

Consistent with Michigan v.

Doran (1978) 439 U.S. 282, may an asylum

state court block extradition on the ground that the fugitive has not been "charged with a crime" because the court concludes, based on extrinsic evidence, that the fugitive is innocent?

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1.

No. 86-

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, FOR THE COUNTY OF  
SAN BERNARDINO,

Respondent,

RICHARD SMOLIN and GERARD SMOLIN,

Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARIOPINIONS BELOW

The opinion of the California Supreme Court (reported at 41 Cal.3d 758, 716 P.2d 991) appears in Appendix A. The opinion of the California Court of Appeal, Fourth Appellate District, Second Division, (unreported decision in case

2.

No. E001358) appears in Appendix B. The oral ruling of respondent San Bernardino County Superior Court (contained in a partial transcript of the proceedings of August 24, 1984, in case No. SCV-224030) appears in Appendix C.

#### JURISDICTION

The decision of the California Supreme Court was filed on May 1, 1986. The People's petition for rehearing was denied on June 5, 1986 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, Clause 2 of the United States Constitution, the Extradition Clause, provides:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from

3.

which he fled, be delivered up, to be removed to the State having Jurisdiction over the Crime."

Title 18 U.S.C. Section 3182, the Federal Extradition Act, provides:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, district or Territory to which the person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within

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thirty days from the time of the arrest, the prisoner may be discharged."

California Penal Code sections 1548.2, 1550.1 and 1553.2, part of the Uniform Criminal Extradition Act, appear in Appendix E.

#### STATEMENT OF THE CASE

##### A. Statement of the Facts

On the morning of March 9, 1984, Richard Smolin and his father Gerard (real parties in interest in this case) took Richard's two young children from a bus stop in St. Tammany Parish, Louisiana, and brought them to California. At the time, the children were living in the custody of their mother (Richard's former wife), Judy Pope and step-father in Louisiana.<sup>1/</sup>

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1. Richard and Judy were divorced in San Bernardino County, California, in 1978, at which time Judy was awarded custody of the children.

5.

Three days later, the prosecutor in St. Tammany Parish charged the Smolins with two counts of parental kidnapping<sup>2/</sup> and warrants for their arrest were issued.

On June 14, 1984, Governor Edwards of Louisiana executed requisition demands upon Governor Deukmejian of California for the arrest of the Smolins and their delivery to agents of Louisiana for return to that state. In accordance with the Uniform Criminal Extradition Act (UCEA), the demand was supported by certified copies of the bill of information and arrest warrants, a 1981 Texas court decree giving full faith and credit to

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2. The bill of information charged a violation of La. Rev. Stat. § 14:45, subdivision (4) of which describes the crime as taking a child "from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state."

6.

a 1978 California court order awarding Judy custody of the children, and a sworn affidavit by Judy Pope which stated:

"On March 9, 1984, at approximately 7:20 a.m., Richard Smolin and Gerard Smolin, kidnapped Jennifer Smolin, aged 10, and James C. Smolin, aged 9, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana. The affiant has custody of the said children by virtue of a Texas court order dated February 5, 1981, a copy of said order attached hereto and made part hereof. The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmie Huessler of 2015 Dridle Street, Slidell,

7.

Louisiana. Richard Smolin and Gerard Smolin were without authority to remove children from affiant's custody."3/

On August 17, 1984, the California governor issued extradition warrants against the Smolins.

B. Proceedings in the State Courts

Prior to their arrest on the Governor's warrants, the Smolins sought habeas corpus relief in the Superior Court of San Bernardino County (respondent in this case). The Smolins argued that they were not "substantially charged with a crime" as required under the UCEA because Richard actually had legal custody of the

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3. The extradition papers also contained a Louisiana court order dated March 9, 1984, granting custody of the children to Judy and prohibiting their removal from the jurisdiction (St. Tammany Parish) pending a contested hearing on the custody matter.

8.

children when he took them from the Louisiana bus stop; therefore he could not be guilty of a crime under Louisiana law. A hearing on the Smolins' application was held on August 24, 1984, at which the superior court judge took judicial notice of the "family law file" involving the 1978 dissolution of the marriage of Richard Smolin and Judy Pope.<sup>4/</sup> Based on material in that file, specifically a modified order which awarded custody of the children to Richard, the superior court found that Judy Pope's affidavit in support of the extradition demand contained falsehoods and granted habeas corpus relief. In so doing, the court quoted at length directly from the

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4. The habeas corpus proceedings were held before the same judge who presided over the earlier family law matter.

9.

record of the family law case, and then concluded "that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an [sic] interest of the State of Louisiana". (See Appendix C.)<sup>5/</sup>

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5. By way of background, evidence before the habeas corpus court below showed that Richard and Judy's California marriage was dissolved in 1978 in San Bernardino County. Judy was awarded custody of the two children at that time. In 1980 Judy remarried and moved to Texas, taking the children with her. In September of that year, Judy commenced proceedings in a Texas court to obtain a full faith and credit decree recognizing the 1978 California custody order. The next month, Richard obtained from respondent superior court a modification of the custody order, the modified order awarding joint custody of the children to Richard and Judy. Judy was served, but did not appear at these proceedings, and was (Footnote continued)

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served with the modified order in November of 1980.

On February 13, 1981, the Texas court issued its full faith and credit judgment recognizing the original (1978) California decree which gave Judy custody. Two weeks later, Richard returned to respondent superior court in California and obtained a second modification of the custody order, this time awarding him sole custody of the children. (It was on the basis of this order that respondent superior court ruled that the Smolins were not substantially charged with a crime in Louisiana.) Over three years later, in March of 1984, the children were abducted; at no time did Richard seek to enforce his California decree in the courts of any other state.

In May of 1984, after the Louisiana kidnapping charges had been filed but before the governor made his extradition demand, both Richard and Judy appeared before respondent superior court in the family law matter. At that time respondent superior court "reaffirmed" its February 27, 1981, order granting sole custody to Richard. Judy appealed the reaffirmation order to the state court of appeal. The appellate court initially reversed the order giving Richard custody for lack of jurisdiction (unreported opinion, filed September 20, 1985, in case No. E001146), then later, upon rehearing, (Footnote continued)

The People sought review of this order by way of a writ of mandate in the Court of Appeal, Fourth Appellate District.<sup>6/</sup> That court reversed the order of respondent superior court, holding that the lower court improperly took judicial notice of the California decree giving Richard Smolin custody since such extrinsic evidence simply offered an affirmative defense which could only be raised in the Louisiana court. (See Appendix B.)

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upheld the lower court's jurisdiction, but reversed for abuse of discretion in confirming the sole custody award to Richard, rather than considering an award of joint custody (unreported opinion, filed February 25, 1986, same case).

6. State law permits such extraordinary relief in extradition matters because it typically produces a much speedier resolution than direct appeal. (See People v. Superior Court (Lopez) (1982) 130 Cal.App.3d 776, 779-780, 182 Cal. Rptr. 132, 134.)

12.

Real parties (the Smolins) sought review of the court of appeal's ruling in the California Supreme Court, which granted hearing in May of 1985. A year later, on May 1, 1986, the state supreme court issued its opinion, reversing the court of appeal and holding that respondent superior court was correct in taking judicial notice of the extrinsic evidence that Richard had been awarded custody by a California court. (See Appendix A.) The state supreme court denied the People's petition for rehearing on June 5, 1986. (See Appendix D.)

\* \* \* \* \*

13.

REASONS FOR GRANTING THE WRIT

The California Supreme Court has exceeded its jurisdiction and has violated article IV, section 2, clause 2, of the United States Constitution, as well as the implementing laws and interpretive decisions of this Court, by holding that the superior court below properly took judicial notice of evidence extrinsic to the extradition papers in determining whether real parties Richard and Gerard Smolin are "substantially charged with a crime", as required for extradition.<sup>7/</sup> The

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7. The superior court blocked the real parties' extradition on the basis that the affidavit of Judy Pope (the complaining witness) falsely declared that real parties "were without authority to remove [the] children from affiant's custody." The superior court reached this conclusion by referring to findings and orders it had made years earlier in the family law case involving the dissolution of Richard and Judy's marriage and the custody of their children. (See Appendix C.)

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state supreme court held that it was proper to look outside the extradition documents to a California court order awarding him custody, to decide therefrom that Richard could not be found guilty under Louisiana law, and to therefore conclude the Smolins were not "substantially charged with a crime" in Louisiana. This holding is absolutely contrary to the purpose of the extradition law since it amounts to an acquittal of the fugitive in one state on charges pending in a sister state. The California Supreme Court's opinion will have far-reaching implications, since it interprets a uniform law subscribed to by virtually all the states, as well as previous decisions of this Court. As the

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nation's largest state, California receives more extradition requests than any other. This decision could have an effect on a substantial number of those requests; nothing suggests that the holding can be restricted to the narrow facts of this case. The California decision in essence preempts the right of a demanding state to try its own charges by permitting the introduction of extrinsic evidence tending to establish innocence in the asylum state. Certiorari must be granted to prevent this unprecedented decision from becoming the law.

\* \* \* \* \*

16.

ARGUMENT

RESPONDENT COURT AND THE CALIFORNIA SUPREME COURT HAVE EXCEEDED THEIR JURISDICTION BY CONSIDERING EXTRINSIC EVIDENCE ON THE QUESTION OF WHETHER REAL PARTIES ARE "SUBSTANTIALLY CHARGED" WITH A CRIME

Article IV, section 2, clause 2, of the United States Constitution provides:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This clause has been implemented by Congress in Title 18, U.S.C. section 3182, and it has been supplemented by the states through the adoption of the Uniform Criminal Extradition Act. In California, the pertinent provisions are Penal Code sections 1548.2, 1550.1 and 1553.2.

17.

Together, these provisions create a mandatory duty upon the asylum state to deliver to a demanding state a person charged with a crime there. Extradition was intended to be a summary executive proceeding in which the judiciary plays an extremely limited role. (Michigan v. Doran (1978) 439 U.S. 282, 288.)

In Michigan v. Doran, this Court defined the limits of the inquiry which an asylum state court is permitted to make:

"[T]he courts of an asylum state are bound by Art. IV, § 3182, and where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met . . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is

the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." (439 U.S. at pp. 288-289; see also Pacileo v. Walker (1980) 449 U.S. 86, 87.)

Real parties have admitted they are the persons who took the children and whose extradition is sought by Louisiana authorities, and there is no question that the extradition documents on their face are in order. Real parties argued, and the state supreme court held, that they are not "substantially charged"<sup>8/</sup> with a

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8. This term derives from earlier decisions of this Court (Munsey v. Clough (1905) 196 U.S. 364, 373; Pearce v. Texas (1894) 155 U.S. 311, 313) and is used in the UCEA (§ 3). (Cal. Pen. Code, § 1548.2.) The adverb "substantially" does not add anything to the constitutional requirement that the person be charged. It simply means that the substance of a criminal charge must be alleged against the person. (See Michigan v. Doran, *supra*, 439 U.S. at p. 285; People v. Noble (1957) 169 NYS.2d 181, 184; Procter v. Skinner (Footnote continued)

crime in Louisiana. However, the state court confused the question of whether respondents are substantially charged with a crime with the question of whether they are innocent.

Whether a person is substantially charged with a crime against the laws of the demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus." (Roberts v. Reilly (1885) 116 U.S. 80, 95, emphasis added.) The courts which have considered this question agree that the inquiry on this issue may not go beyond the face of the

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(*Ida.* 1982) 659 P.2d 779, 782; People v. Sheriff of Westchester County (NY 1929) 166 NE 795, 796; see generally, Matter of Strauss (1905) 197 U.S. 324, 331.)

extradition documents.<sup>9/</sup> No cases have been found which permit the consideration of evidence extrinsic to the documents on the issue of whether the fugitive is substantially charged; certainly the California Supreme Court found none to support its unprecedented holding.

The two cases apparently relied upon most heavily by the state court are not helpful. In People ex rel. Lewis v. Com'r of Correction (1979) 417 NYS.2d 377, it was held that

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9. See, e.g., United States v. Flood (2d Cir. 1967) 374 F2d 554, 556; Moncrief v. Anderson (DC Cir. 1964) 342 F2d 902, 904; Kerr v. Watson (Ore. 1982) 649 P2d 1234, 1238; Fisco v. Clark (Ore. 1966) 414 P.2d 331, 333 Ex parte Paulson (Ore. 1942) 124 P2d 297, 300; Ex parte Harrison (Tex. 1978) 568 SW2d 339, 342; Eroh v. Sheriff (Mich. App. 1978) 272 NW2d 720, 722; Black v. Miller (9th Cir. 1932) 59 F2d 687, 690. Also, for a case very similar to the case at bench, see People ex rel. Leach v. Baldwin (Ill. 1930) 174 NE 51.

an asylum state court may inquire whether the act alleged in the extradition papers constitutes a crime according to the law of the demanding state. That a court may judicially notice the law of the demanding state in determining if the fugitive is substantially charged is not disputed. However, the question is one of law - whether the charge on the face of the papers alleges a violation of the demanding state's law - Lewis in no way sanctioned the admission of extrinsic evidence on this question.

Likewise, in Application of Varona (Wash. 1951) 232 P.2d 923, the charge was theft from a partnership. However, the extradition documents themselves indicated that the accused was a partner in the victimized business. Examination of the statutory

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and decisional law of the demanding state (California) revealed that the act charged was not in the abstract a crime under California law at that time, since a partner could not be guilty of theft from his own partnership. Again, contrary to the California Supreme Court's attempt to liken that case to the present one, Varona did not involve consideration of evidence outside the extradition papers themselves. Rather, it was limited to the face of the extradition documents.

In Biddinger v. Commissioner of Police (1917) 245 U.S. 128, this Court addressed the question of what extrinsic evidence is admissible in an extradition habeas corpus proceeding. There it was stated "that when the extradition papers required by the statute are in proper form the only

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evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed ...." (245 U.S. at p. 135.) Fugitivity being a question of fact, extrinsic evidence is permitted - not so the question of law whether the fugitive is substantially charged.

This case illustrates very clearly why extrinsic evidence is not permitted on the issue of whether the person is substantially charged. No principle of extradition law is more settled than that the asylum state may not inquire into the guilt or innocence of the accused or consider any affirmative defense to the crime. (UCEA § 20 (Calif. Pen. Code, § 1553.2); Michigan v. Doran, supra,

Biddinger v. Commissioner of Police,  
supra; Drew v. Thaw (1914) 235 U.S.  
 432, 439-440; Strassheim v. Daily  
 (1911) 221 U.S. 280, 283, 286.) When  
 an asylum state court admits extrinsic  
 evidence, for example to attack the  
 veracity of the complaining witness as  
 in this case, the court is doing  
 nothing more nor less than permitting  
 the introduction of an affirmative  
 defense which should only be permitted  
 in the demanding state where the  
 charges are pending.<sup>10/</sup> This evidence

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10. The superior court below  
 based its order granting habeas corpus  
 relief on a finding that the averments  
 of the complaining witness in her sworn  
 affidavit were false. (This finding by  
 the court was not surprising - it  
 simply reflected the same judge's  
 earlier conclusions in the family law  
 matter.) However, in deciding the  
 question of whether there is a  
 substantial charge, the asylum state  
 court may not inquire into the truth of  
 the allegations. (Pierce v. Creecy  
 (1908) 210 U.S. 387, 403; see also  
People v. Schneckloth (Colo. 1983) 660  
 (Footnote continued)

does not establish that the accused has  
 not been charged, it only suggests that  
 he might be innocent. Even if that be  
 the case, it is a question only the  
 demanding state's courts have  
 jurisdiction to determine. (Drew v.  
Thaw, supra, 235 U.S at p. 439.)

In Drew v. Thaw the fugitive,  
 accused of escape from a mental  
 institution, contended in his habeas  
 corpus challenge to extradition that if  
 he was insane at the time he contrived  
 his escape he could not be guilty,  
 while if he was not insane he was

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P2d 1293, 1295; Stack v. State ex rel.  
Morgan (Fla. App. 1980) 381 So2d 366.)  
 "An attack on credibility is, in  
 effect, an attack on the demanding  
 state's finding of probable cause.  
 Such an attack is possible only in the  
 courts of the demanding state.  
 [Citations.] Once a court in the  
 asylum state has satisfied itself with  
 the facial validity of the documents,  
 no further inquiry is appropriate on  
 this issue. [Citations.]" (People v.  
Schneckloth, supra, at p. 1295.)

entitled to be discharged from the institution anyway. He claimed the facts in the record required a finding that he was insane. This Court disposed of the contention, declaring:

"But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. . . . When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that State and the reasonable possibility that it might be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculation as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." (235 U.S. at pp. 439-440, emphasis added.)

This principle was echoed a few years later in South Carolina v. Bailey (1933) 289 U.S. 412, where the accused raised the question of fugitivity on habeas corpus in the asylum state: "It was wholly beyond the province of the judge [on habeas corpus] to speculate, as he seems to have done, concerning the probable outcome of any trial which might follow rendition to the demanding State." (289 U.S. at p. 420.)

The underlying reasoning of the California Supreme Court herein is that because real parties should be found not guilty in Louisiana (in light of Richard's California custody order), they are not charged with a crime. This sophistry is in absolute contradiction to the settled principles announced by this Court in Drew v.

Thaw, South Carolina v. Bailey, Roberts v. Reilly and other cases. The state supreme court offers the astounding observation that "the efficiency of the extradition process is enhanced rather than hampered by a resolution of the issue [of the effect of Richard's custody order on the Louisiana charges] by a California court." (People v. Superior Court (Smolin) (1986) 41 Cal.3d 758, 772.)<sup>11/</sup> While in many

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11. The California Supreme Court cites Ierardi v. Gunter (1st cir. 1976) 528 F2d 929, 93, at this point. In that case the court held that if the extradition papers did not show that a judicial finding of probable cause had been made in the demanding State, a court in the asylum State must do so as a prerequisite to interstate rendition. (Citing Gerstein v. Pugh (1975) 420 U.S. 103.) Ierardi provides absolutely no support for the California court's decision in the present case. First, Ierardi was decided before Michigan v. Doran. Second, and more importantly, in the present case there was a judicial finding of probable cause made in Louisiana which was not reviewable in California. (Michigan v. Doran, supra, 439 U.S. at p. 290.)

cases it may appear more "efficient" simply to determine a fugitive's guilt or innocence in the asylum state, such a practice not only ignores the mandate of the Constitution and pronouncements of this Court, but affronts the judicial system of the demanding state.

"The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. [Citations.] The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states. It articulated, in mandatory language the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV....

"The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry

traditionally intervening between the initial arrest and trial." (Michigan v. Doran, supra, 439 U.S. at pp. 287-288, emphasis added.)

Here, the California courts went beyond a "preliminary inquiry"; they made a determination on the ultimate issue of real parties' guilt or innocence. The state supreme court's futile attempt to disguise this determination as a finding that real parties are not charged is readily transparent. This court pointed out in Pierce v. Creecy, supra, 210 U.S. 387, 401:

"... [I]t will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of a crime for reasons that are apt only to destroy its validity as a criminal pleading."

Similarly, the California Supreme Court pays lip service to the

rule that there can be no inquiry into the issue of guilt or innocence in the asylum state, then holds the fugitives are not substantially charged "for reasons that are apt" only to show their innocence. Thus, throughout its opinion the state court engages in the charade of recognizing its lack of authority for doing precisely what it proceeds to do.<sup>12/</sup>

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12. A perfect example is the court's statement that recognition of the California orders giving Richard Smolin custody of the children "does not violate the principle that an asylum state may not apply its own laws in deciding whether the conduct charged amounted to a crime, because it results only in an acknowledgement of the existence of the orders rather than an assessment of their effect on the charge." (People v. Superior Court (Smolin), supra, 41 Cal.3d at p. 770.) To the contrary, the effect of the orders on Louisiana's charge is precisely the point upon which the court's decision turns - the effect is that if Richard has custody of the children he cannot be found guilty of the charge - therefore, he is not substantially charged. (41 Cal.3d at p.766.)

The state court steps further into the realm of Orwellian "double speak" by proclaiming that its holding is in "complete harmony" with Michigan v. Doran because the custody order "is at least as verifiable as the other matters referred to in the Supreme Court's opinion, such as whether the petitioner is a fugitive from justice."

(41 Cal.3d at p. 770.) As Justice Lucas accurately stated in dissent:

"The majority has put the cart before the horse. What the Supreme Court in Michigan v. Doran held was that there are only four matters that can be considered in habeas corpus extradition proceedings. Although the high court added that these four matters "are historic facts readily verifiable" (438 U.S. at p. 289), it did not hold that a court may consider any other matters (such as asylum state custody rulings or defenses to the crime charged) which

may also be considered 'historic facts readily verifiable.' The four areas of inquiry described by the court were not illustrative. They were meant to define and restrict the actual boundaries of permissible inquiry. Thus, the trial court clearly exceeded its jurisdiction in considering the California custody ruling because that was not a matter fully under one of Michigan v. Doran's four categories." (41 Cal.3d at p. 775.)

The California holding amounts to a gross misinterpretation of Michigan v. Doran and cannot stand. Allowing consideration of extrinsic evidence on the question of whether the accused is charged inevitably leads a court into the issue of guilt or innocence - an inquiry strictly reserved for the demanding state. There is nothing in the state court's opinion to indicate its rationale would, or could, be limited to the

rather unique facts of this case.<sup>13/</sup>  
 If this decision is permitted to stand and become the law of the State of California, its effect will obviously be felt by the other states. Indeed, only their interests will be affected. No precedent supports the holding, and it is contrary to the letter and spirit

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13. For example, this case would provide authority for an accused automobile thief, wanted in another state and arrested in California, to claim he is not "substantially charged" because he possesses a "pink slip" or other official certificate of ownership for the vehicle. Certainly such an official document would be as "readily verifiable" as the custody orders in this case. Since the certificate would show the fugitive's ownership, and since he could not be found guilty of stealing his own car, under the California Supreme Court's rationale, he is not "charged." Many other examples could be cited, and each would demonstrate further the fallacy of the state court's reasoning. Simply put, the determination of whether a fugitive is substantially charged must be made on the face of the papers, regardless of the accessibility of extrinsic evidence.

of many pronouncements by this Court regarding the limits of an asylum state court's jurisdiction. The constitutional protection at issue here belongs to the State of Louisiana. It is guaranteed the right to obtain custody of persons against whom its officers have duly filed criminal charges. California has no jurisdiction to decide the fugitives' guilt or innocence and thereby deprive Louisiana of this right. The decision of the California Supreme Court violates the most fundamental principles underlying the law of extradition and must therefore be reversed.

\* \* \* \* \*

CONCLUSION

For the foregoing reasons, it is respectfully requested that the application for writ of certiorari be granted.

DATED: August 29, 1986

Respectfully submitted,

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SA86US0005  
August 29, 1986

A P P E N D I X "A"

SUPREME COURT  
FILED  
May 1, 1986  
LAURENCE P. GILL,  
Clerk

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Deputy

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Petitioner,	)	L.A. 32068
	)	
v.	)	Super. Ct. No.
	)	SCV 224030
THE SUPERIOR COURT OF	)	
SAN BERNARDINO COUNTY,	)	
	)	
Respondent;	)	
	)	
RICHARD SMOLIN et al.,	)	
	)	
Real Parties in	)	
Interest.	)	

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Early on a morning in March 1984,  
Richard Smolin and his father Gerard (for  
convenience referred to as defendants) took  
Richard's two young children from a bus stop  
in St. Tammany's Parish, Louisiana, and

-- SEE DISSENTING OPINION --

2.

brought them to California. Three months later, the Governor of Louisiana requested that defendants be extradited to Louisiana on a charge of kidnapping. The extradition documents forwarded to California did not refer to a custody order made by a California court in February 1981 that had awarded sole custody of the children to Richard. The primary issue in this proceeding for writ of mandate is whether a California court may take judicial notice of its own custody order in determining whether Louisiana's request for extradition must be honored.

In January 1978 a California court granted Richard's petition for dissolution of his marriage to Judith Smolin (now Judith Pope), and awarded custody of the two children of the marriage to Judith, with visitation rights in Richard. Thereafter, Judith remarried; she moved with the children

3.

first to Oregon, then to Texas, and finally to Louisiana.

In October 1980 a California court, on Richard's motion, modified the original custody decree, awarding joint custody of the children to both parents on a finding that Richard had been frustrated in exercising his visitation rights because Judith had removed the children from California without notice. Judith was served in Texas with the order to show cause, as well as a copy of the modification order.

On February 13, 1981, a Texas court issued a "Judgment for Full Faith and Credit" purporting to recognize the 1978 California decree granting custody of the children to Judith. The Texas judgment was thus issued almost four months after California had modified its original decree by granting joint custody to both parents.

A further modification of the California decree was made by a California court in an order filed on February 27, 1981. This time Richard was awarded sole custody, after the court found that Judith had refused to allow any contacts between him and the children. Judith was served with the order to show cause regarding this proposed modification, but when an attempt was made to serve the actual modification order on her, it was at first unsuccessful because she had moved and left no address. She was eventually served with the order in Louisiana in February 1984, the month before the alleged kidnapping occurred.

Defendants took the children on March 9, 1984. Three days later an assistant district attorney in St. Tammany's Parish, Louisiana, filed an information charging defendants with two counts of kidnapping in violation of section 14.45 of the Louisiana

Revised Statutes (hereinafter R.S.A.

§ 14.45). Subdivision (4) of that statute prohibits the "intentional taking . . . and removing from the state, by any parent, of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the child." Warrants of arrest were issued the next day by a Louisiana judge, based on the filing of the information.

Seven weeks later, on April 30, 1984, Judith filed an affidavit before a judge in Louisiana, reciting that defendants had kidnapped the children from a bus stop on March 9, 1984, at 7:30 a.m., and naming the witnesses who saw the purported abduction. The affidavit asserted that Judith had

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custody of the children by virtue of the February 1981 Texas full faith and credit judgment. It did not mention the prior California decree granting joint custody or the later California order that granted Richard sole custody. The record indicates that, like Judith, the assistant district attorney who filed the information knew of the California orders at the time the information was filed.<sup>1/</sup>

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1. A declaration filed by Gerard Smolin's attorney in support of his petition for habeas corpus, describes a telephone conversation with the Louisiana assistant district attorney. According to the declaration, the Louisiana attorney admitted that he knew at the time of the alleged kidnapping that Richard "was entitled to custody of the minor children . . . by virtue of a California custody decree." However, he believed nevertheless that a crime had been committed because "he viewed the California judgment as being void, having been obtained by fraudulent misrepresentations, and the valid order having been that issued by Texas on February 13, 1981." The Louisiana attorney filed a counter-declaration, but he did not deny that he made these statements.

7.

Judith returned to California to recover custody of the children; she thereby submitted to the jurisdiction of California courts. Following three days of hearings in May 1984, the California court affirmed the February 27, 1981, order granting sole custody to Richard, with reasonable visitation rights in Judith.

The Governor of Louisiana issued a warrant of extradition on June 14, 1984. The request was accompanied by Judith's affidavit, the arrest warrants, the information, and an "Application for Requisition" signed by an assistant district attorney in Louisiana requesting the governor to seek extradition.<sup>2/</sup>

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2. Also included with the extradition documents were a petition filed in Louisiana by Judith on March 9, 1984, following the alleged kidnapping, seeking a restraining order to prevent Richard from removing the children from Louisiana and an order to award (Footnote continued)

In August 1984, defendants filed separate petitions for writs of habeas corpus in the San Bernardino Superior Court, alleging that they were in imminent danger of arrest because the office of Governor Deukmejian had indicated that he was about to issue warrants of extradition. The petitions set forth the facts recited above regarding the California custody decrees, and included some supporting documents. In their points and authorities, defendants urged the trial court to take judicial notice of the

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(Footnote 2 continued)

custody to Judith, as well as an order signed by a judge granting the relief sought. The petition, which was unsigned, alleged that Richard had kidnapped the children, that Judith had custody by virtue of the California dissolution decree granting her such custody, which was recognized by the Texas full faith and credit judgment of February 13, 1981, that the Texas decree had not been abrogated by proper legal process, that Richard had failed to support the children for three years, and that Judith's husband had pending in Louisiana a petition to adopt them.

California custody orders. They asserted that those orders establish that Richard had custody of the children under federal law, the Parental Kidnapping Prevention Act of 1980 (28 U.S.C.A. § 1738A, hereinafter PKPA), and that because custody was with Richard he could not be guilty of kidnapping under Louisiana law. The trial court, which had previously granted a writ of prohibition to prevent enforcement of the Louisiana warrants, issued orders to show cause directed to Governor Deukmejian, the District Attorney of St. Tammany's Parish, and the Sheriff of San Bernardino County, directing them to bring the warrants of extradition before the court to determine the facts and law relating to the threatened imprisonment. The return, which was accompanied by warrants of rendition issued by Governor Deukmejian, contended that extradition was required because the documents submitted by Louisiana

with the request were regular on their face and charged a crime under Louisiana law, and that the trial court had no authority to go beyond the face of the documents to consider the effect of the California decrees or the sufficiency of Judith's affidavit.

Following a hearing during which the court took judicial notice of the California family law file, the court found in favor of defendants. It read into the record statements made by the trial judge during the May 1984 custody proceeding that were critical of Judith's conduct in a number of respects, such as her refusal to allow Richard to have contact with the children.<sup>3/</sup> The court concluded that the State of

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3. The same trial judge presided over the May 1984 proceeding (which affirmed the earlier order granting sole custody to Richard) and the habeas corpus proceeding. The People did not make a motion to disqualify the judge on this ground, although they were invited to do so by the court.

Louisiana had failed to demonstrate that it had any rights with respect to the extradition of defendants.<sup>4/</sup> It therefore granted the writs of habeas corpus and discharged defendants.

The People now seek a writ of mandate to vacate these orders. They primarily contend that the trial court erred in considering the California family law file in support of its determination, and in particular the California orders awarding custody of the children to Richard.

Under the extradition clause of the United States Constitution (art. IV, § 2, cl. 2), a person charged with crime who flees

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4. The judge stated, "The court would conclude that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an interest of the State of Louisiana."

from justice and is found in another state must, on demand, be delivered to the state having jurisdiction of the crime. The word "demand" in the constitutional provision denotes an "absolute right" to obtain extradition, thereby implying a "correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." (Kentucky v. Dennison (1861) 65 U.S. 66, 103; State of South Dakota v. Brown (1978) 20 Cal.3d 765, 768-769.) Interstate extradition is intended to be a summary proceeding designed to bring offenders to trial as swiftly as possible in the state where the offense was committed. (Michigan v. Doran (1978) 439 U.S. 282, 287-288.) Therefore, a court in the asylum state, considering an application for a writ of habeas corpus to resist extradition, is limited in the scope of its inquiry: it may

not inquire into the credibility of the affiant on whose declaration the charge is based (Jacobsen v. State (Idaho 1978) 577 P.2d 24, 28) or into the guilt or innocence of the person sought by the demanding state (In re Kimler (1951) 37 Cal.2d 568, 571; In re Murdock (1936) 5 Cal.2d 644, 648, Pen. Code, § 1553.2).

Michigan v. Doran, holds that once the governor of the asylum state has granted extradition, a court considering release on habeas corpus can do no more than decide "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." The high court added that

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these "are historic facts readily verifiable." (439 U.S. at p. 289.)<sup>5/</sup>

Many states, including Louisiana (La. Code Crim. Proc., art. 261 et seq.) and California (Pen. Code, § 1548 et seq.) have adopted the Uniform Criminal Extradition Act to facilitate their duty to extradite persons charged with crime by another state. Under the uniform act as adopted in California, a demand for extradition of a person charged with crime must be recognized if it alleges that the accused was present in the demanding

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5. In Michigan v. Doran, the Supreme Court considered a request by Arizona to Michigan to extradite a person accused of crime committed in Arizona. The Michigan court found the Arizona request deficient because, in its view, the supporting documents did not demonstrate probable cause for charging the petitioner with a crime, despite a statement by the Arizona judge that such a finding had been made. The high court reversed, holding that when a neutral judicial officer of a demanding state has made a finding of probable cause, no further judicial inquiry may be had on that issue in the asylum state.

state at the time the crime was committed and fled therefrom. The demand must be accompanied by an indictment, information, or an affidavit made before a magistrate in the demanding state (with a copy of a warrant issued thereon), which substantially charges a crime under the law of the demanding state. (Pen. Code, § 1548.2.)<sup>6/</sup>

Defendants admit that they are the persons whose extradition is sought by Louisiana, and that they left that state with the children. They claim, however, that Louisiana has not substantially charged them

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6. The uniform act as adopted in California and other jurisdictions requires that the papers must "substantially charge" a crime under the law of the demanding state. Michigan v. Doran, in setting forth the requirements for extradition, omits the word "substantially." The opinion in that case explains that the term derives from earlier decisions of the United States Supreme Court. (439 U.S. at p. 285, fn. 4.) We shall refer to this requirement in the manner set forth in the uniform act and our own statute.

with a crime, and they were therefore entitled to be discharged. They reason as follows: Under the Louisiana statute relied on by the People, a parent may not be charged with kidnapping a child if he is entitled to custody, and the California decree demonstrates that Richard was entitled to custody of the children at the time of the alleged kidnapping. In deciding whether defendants had been substantially charged with a crime, the trial court was authorized to take judicial notice of the California decree and to recognize its binding effect under the PKPA.

As a preliminary matter, we note that the basis of the trial court's ruling in favor of defendants is not altogether clear. (See fn. 4, ante.) We agree with defendants, however, that the court's remarks at the conclusion of the hearing may be fairly construed as a finding that Louisiana had not

substantially charged them with a crime, and we proceed with our discussion on that assumption.

We concur also in defendants' assertion that under Louisiana law a parent entitled to the custody of a child cannot be found guilty of kidnapping. The language of subdivision (4) of R.S.A. § 14.45 defines the crime as taking a child "from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state." Thus, in order to charge a crime under the statute the person deprived of custody must have been awarded custody by such a court. And it has been held in Louisiana that a father who shares equal custody rights with the mother cannot be found guilty of kidnapping under this statute when he takes a child without the permission of the mother. (State v. Elliott (La. 1930) 131 So. 28, 30.)

There is a problem at the threshold of our analysis. The courts of this state may not inquire into the guilt or innocence of the person whose extradition is sought (Pen. Code, § 1553.2), but may deny extradition if the demanding state has not substantially charged that person with a crime (*id.*, § 1548.2). We must first decide, therefore, whether defendants' challenge to the sufficiency of the extradition request amounts to a claim that they are innocent of kidnapping, or whether their assertion may properly be characterized as a claim that Louisiana has not substantially charged them with a crime.<sup>7/</sup>

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7. For the purpose of considering this preliminary question we shall assume that the trial court here acted correctly in taking judicial notice of the California custody ruling.

The difference between these issues is somewhat elusive, because they may be interrelated.<sup>8/</sup> We think, however, that when as here the extraditee admits that he has performed the acts with which he is charged but claims, for reasons independent of his own conduct or state of mind, that those acts do not amount to the commission of a crime under the laws of the demanding state, the gravamen of his assertion is that no crime was charged against him. (See *People ex rel. Lewis v. Com'r. of Correction* (1979) 417 N.Y.S.2d 377, 380-382.) To illustrate: if the Louisiana extradition papers had been accompanied by a custody decree which showed

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8. It would ordinarily follow from the fact that a crime was not substantially charged that the person against whom the attempted charge was made was not guilty of its commission. But the converse, of course, is not true: from the fact that a person may be found not guilty of a crime it does not follow that the crime itself was not substantially charged.

that custody was in Richard, it seems clear that defendants could properly claim they had not been substantially charged with a crime under Louisiana law.

A charge of crime is deemed not to be substantial if, for example, the statute under which the demanding state makes the charge has been declared unconstitutional by the highest court of that state or the United States Supreme Court (In re Cooper (1980) 53 Cal.2d 772, 779-780), the statement of the charge does not fall within the demanding state's statutory definition of the crime (In re Katcher (1952) 39 Cal.2d 30, 31-32), or the acts charged do not constitute a crime under the law of the demanding state (Application of Varona (Wash. 1951) 232 P.2d 923, 924, People ex rel. Lewis v. Com'r. of Correction, 417 N.Y.S.2d 377, 380-382). In Varona, California sought extradition of a person it charged with feloniously taking

money from a partnership of which he was a member. Extradition was denied for failure to substantially charge a crime because under California law a partner could not be held guilty of misappropriating partnership funds. So here, defendants assert they are not substantially charged with violating Louisiana's kidnapping statute because it provides that the person from whose custody a child is taken must have been awarded custody by a court of competent jurisdiction, and it is Richard rather than Judith who was entitled to custody at the time of the alleged kidnapping.<sup>9/</sup>

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9. We recognize that some cases hold that the asylum state must leave the determination of whether the laws of the demanding state render the extraditee's conduct a crime to the laws of that state. (E.g., Hopper v. State ex rel. Schiff (N.M. 1984) 678 P.2d 699, 701.) Here, however, the Louisiana statute on its face provides that this type of kidnapping may be committed only by a parent who lacks custody. The (Footnote continued)

Thus far we have concluded that, assuming the California decree was properly considered by the trial court, defendants' assertion based thereon raised the issue whether Louisiana had substantially charged them with the crime of kidnapping.

A more difficult question is whether the trial court had the power to consider the

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(Footnote 9 continued)

extradition papers implicitly recognize that custody in Judith is a necessary predicate to the charge: the Governor's extradition request and Judith's affidavit both rely on the Texas full faith and credit judgment as granting her custody. In these circumstances defendants are claiming that the charge is void on its face (cf. *In re Cooper*, supra, 53 Cal.2d 772, 779-780) and "lacking altogether in a reasonable basis" (*In re Katcher*, supra, 39 Cal.2d 30, 31). In a case decided after *Michigan v. Doran*, it was held that the courts of New York, the asylum state, had the power to inquire whether the act alleged against the extraditee constituted a crime under the laws of the demanding state to the extent that he claimed that the statutory or decisional law of that state did not establish the act as criminal, or that to make the act criminal would violate the United States Constitution. (*People ex rel. Lewis v. Com'r. of Correction*, supra, 417 N.Y.S.2d 377, 379-380.)

California sole custody decree to support its determination that Louisiana had failed to substantially charge defendants with a crime.<sup>10/</sup> Under the Evidence Code, a court must take judicial notice of the records of any court of this state, upon proper notice to the court and the adverse party. (Evid. Code, §§ 452, subd. (d)(1), 453.) The People claim that this requirement cannot be applied in an extradition proceeding. Relying on the rule that only relevant evidence is admissible by judicial notice (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578), they assert that the California order is not relevant to the only issue before the court, which they

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10. We need not decide whether the court properly took judicial notice of the entire family law file, including statements of the trial judge which were critical of Judith's conduct. It is sufficient for our purposes to limit consideration to the custody orders made by the California court.

characterize as whether the documents submitted by Louisiana support its extradition demand, in the light of Louisiana law.

While the foregoing contention is ingenious, its force depends on the resolution of the main issue involved in this proceeding in favor of the People, namely, their claim that in determining whether a crime is charged the courts of an asylum state may not go beyond the face of the extradition documents (and the law of the demanding state) by taking judicial notice of their own orders.

The People cite no convincing authority for this proposition. Michigan v. Doran holds that the asylum state in a habeas corpus proceeding must decide "whether the petitioner has been charged with a crime in the demanding state" (439 U.S. at p. 289), but it does not give any guidance as to the

matters which may be considered in making that determination. Other cases contain language in support of the People's position, but none of them involves the question we are confronted with here. United States v. Flood (2d Cir. 1967) 374 F.2d 554, 556, upon which the People primarily rely, did not relate to a claim that the extradition papers failed to charge the petitioner with a crime. Rather, the issue there was the sufficiency of the affidavit attached to the extradition warrant because it was based on hearsay evidence, and the court concluded that the persuasiveness of the affidavit was not a subject on which the courts of the asylum state could pass judgment.<sup>11/</sup> Moncrief v. Anderson (D.C.Cir.

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11. The decision, in assessing the claim of hearsay, concludes: "But, in considering the sufficiency of the extradition warrant and the papers accompanying it . . . it is not for the asylum state on habeas corpus to pass upon the quality, persuasiveness or (Footnote continued)

1964) 342 F.2d 902, states in dictum in a footnote only that the question whether a valid charge has been made "can" be determined from the extradition papers (fn. 3 at p. 904), not that it must be. Roberts v. Reilly (1885) 116 U.S. 80, 95-96, also contains broad language which leans toward the position of the People, but again the court's holding does not appear to relate to the problem at hand.<sup>12/</sup> Finally, in In re

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(Footnote 11 continued)

weight of the evidential matter on the basis of which the Governor of Florida issued the extraordinary warrant, for it is solely a question of law whether on the face of the papers accompanying the warrant there was sufficient to say that a crime was 'substantially charged . . . under the laws of Florida and that he was alleged to be a fugitive.' (374 F.2d at p. 556.)

12. The opinion states that the question whether a person is substantially charged with a crime is a question of law which "is always, open upon the face of the papers to judicial inquiry." (116 U.S. at p. 95.) Later, the court rejects the petitioner's (Footnote continued)

Harper (1936) 17 Cal.App.2d 446, 448, the court, relying on the language of Roberts v. Reilly held that it was "apparent" from the requisition and statute of the demanding state that a crime had been charged.<sup>13/</sup>

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(Footnote 12 continued)

claim that the indictment did not substantially charge larceny because it did not state that the corporation from whose possession the property was taken was capable of ownership under the law of the demanding state. This issue, states the court, "is not matter of law arising upon the face of the indictment, but can arise only at the trial upon the evidence, if the question should then be made. The averment in the indictment is the allegation of a fact which does not seem to be impossible in law, and is, therefore, traversable." (Id. at p. 96.) This language is not altogether clear, but we read the court's holding to mean that the courts of an asylum state are foreclosed from inquiring whether the law of the demanding state renders the actions alleged in the indictment a crime. The People concede that this is not the law as it stands today. Indeed, they insist that such an inquiry is necessary to provide a legal frame of reference for deciding whether a crime has been charged.

13. The petitioner in Harper attempted to raise matters outside the scope of the (Footnote continued)

We perceive no valid reason for fashioning an exception to the requirements of the Evidence Code by creating a rule that a court may not take judicial notice of its own orders in considering a habeas corpus petition in an extradition proceeding. Recognition of such orders does not violate the principle that an asylum state may not apply its own laws in deciding whether the conduct charged amounted to a crime, because it results only in an acknowledgement of the existence of the orders rather than an assessment of their effect on the charge. Moreover, such a ruling is in complete harmony with the statement in Michigan v.

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(Footnote 13 continued)  
requisition papers in support of his claim that a charge had not been made against him. The court rejected this attempt on the ground that the matters which petitioner raised went to the question of guilt or innocence, an issue which the court was foreclosed from investigating.

Doran which describes the matters that the courts of an asylum state may consider in habeas corpus extradition proceedings as "historic facts readily verifiable." (439 U.S. at p. 289.) Certainly, the fact that a court has made a particular order is at least as verifiable as the other matters referred to in the Supreme Court's opinion, such as whether the petitioner is a fugitive from justice. Lastly, as we shall see, judicial notice in this context does not infringe on the governmental interests at stake in an extradition proceeding.

We conclude that the trial court acted properly when it took cognizance of the California sole custody order in making its determination that the extradition papers did not charge a crime. So far as we are aware, the validity of that order had never been challenged by either Judith or Louisiana at the time the alleged kidnapping occurred. If

such a challenge may be implied from Louisiana's reliance on the intervening Texas judgment, purportedly based on full faith and credit, we do not hesitate to support defendants' claim that the California decree prevails.

There is no jurisdictional obstacle to our consideration of this issue. The question is one of federal law, as expressed in the PKPA, which preempts state law on the issue of jurisdiction by a state to render a valid custody decree. (State ex rel. Valles v. Brown (N.M. 1981) 639 P.2d 1181, 1184.) The courts of California are not precluded from assessing the effect of that law on the controversy. In *In re Cooper*, supra, 53 Cal.2d 772, 779-782, we analyzed the effect of decisions of the United States Supreme Court in determining whether the Pennsylvania statute under which the petitioners were charged was void on its face. (Accord,

*People ex rel. Lewis v. Com'r. of Correction*, supra, 417 N.Y.S.2d 377, 381.)

The PKPA provides that "every State shall enforce according to its terms, and shall not modify . . . any child custody determination made consistently with the provisions of this section by a court of another State." (28 U.S.C.A. § 1738A(a).) A state has jurisdiction to make a custody order if such jurisdiction exists under its own laws and it is the home state of the child at the time the order is made. (Id., subds. (c)(1), (c)(2)(A).) The term "home state" is defined as the one in which, "immediately preceding the time involved, the child lived with his parents . . . for at least six consecutive months . . . ." (Id., subd. (b)(4).) Modification of a custody order valid under this standard may be made only by the court which originally rendered

the decree, except in circumstances not relevant here.<sup>14/</sup>

The original decree issued by California in 1978 granting custody of the children to Judith must be conceded by the People to have been valid when it was made, since Judith's claim to custody, a necessary predicate to the kidnapping charge under Louisiana law, has its origin in that decree. On the face of the record, therefore, only California had jurisdiction to modify that decree.

The Texas judgment, filed on February 13, 1981, which purported to give effect to the 1978 custody order rendered in California, was preceded by almost four

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14. For example, a state which is not the home state of the child may modify a custody decree if neither the child nor a contestant lives in the home state at the time the modification is sought, or if the home state no longer has jurisdiction (*id.*, subd. (d)) or has declined to exercise jurisdiction (*id.*, subd. (f)).

months by the California order of October 20, 1980, modifying the original judgment to grant joint custody of the children to both parents. More important, on February 27, 1981, a court of this state--the only court with jurisdiction to modify the decree--granted sole custody to Richard. Thus, when Louisiana filed the information on March 12, 1984, charging petitioners with kidnapping on the premise that the Texas judgment was the act of a "court of competent jurisdiction" which had granted custody of the children to Judith (R.S.A. § 14:45), that decree had long been superseded by the February 27, 1981, California sole custody order.<sup>15/</sup>

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15. The decree of a Louisiana court issued on March 9, 1984, following the alleged kidnapping (see fn. 2, *ante*), may not be deemed an order binding on California. The PKPA grants a court jurisdiction to make an emergency custody order if a child is (Footnote continued)

We are mindful of the duty of our courts to faithfully and vigorously enforce the constitutional provision requiring extradition, and we recognize that our obligation in this regard should not be "so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum" in California. (Appleyard v. Massachusetts (1906) 203 U.S. 222, 228.) But we cannot ignore the fact that extradition represents a "significant

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(Footnote 15 continued)  
physically present in the state at the time of the order and it is necessary to protect the child because he has been subjected to or threatened with mistreatment or abuse. (28 U.S.C.A. § 1738A(c)(2)(C).) Even if this provision could be applied to the March 9 order, there is no indication that the children were present in Louisiana when the order was issued or that defendants were served with the order prior to leaving the state with the children. Moreover, the Louisiana Governor's warrant was based not on defendants' violation of the order of the Louisiana court, but on existence of the Texas full faith and credit judgment.

pretrial restraint of liberty." (Ierardi v. Gunter (1st Cir. 1976) 528 F.2d 929, 930.) The important governmental interests at stake in the prompt execution of extradition requests are comity between the states and efficiency in bringing fugitives to justice. (Ibid.) These interests are not jeopardized by our holding. Since Louisiana would be compelled under the terms of the PKPA to take judicial notice of the California order, there is no justification for withholding recognition by a California court.<sup>16/</sup>

Furthermore, the effect of the order must be decided under federal law rather than Louisiana law. This is a determination which the courts of California are empowered to

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16. The PKPA contemplates that the courts of each state will take judicial notice of the custody orders issued in other jurisdictions because a determination whether a foreign decree is consistent with the federal law may be made only if the existence of the foreign decree is acknowledged.

make. Thus, the efficiency of the extradition process is enhanced rather than hampered by a resolution of the issue by a California court. (Cf. Ierardi at p.931.)<sup>17/</sup>

Under all the circumstances, we conclude that the trial court did not err in deciding that defendants had not been substantially charged with a crime by Louisiana. While we feel compelled to express our disapproval of the self-help manner in which defendants chose to enforce Richard's right to custody, we hold nevertheless that defendants were entitled to be discharged.<sup>18/</sup>

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17. In Ierardi the court decided that the efficiency of the extradition process was not significantly diminished by its holding that if the courts of the demanding state failed to determine whether there was probable cause to charge the petitioner the courts of the asylum state may do so.

18. Defendants' motion of October 3, 1985, to augment the record on appeal, is denied.

The alternative writ is discharged, and the petition for writ of mandate is denied.

MOSK, J.

WE CONCUR: BIRD, C.J.  
BROUSSARD, J.  
REYNOSO, J.  
GRODIN, J.  
\* TODD, J.

\* Honorable Kathryn Doi Todd, Los Angeles Superior Court, assigned by the Chairman of the Judicial Council.

PEOPLE v. SUPERIOR COURT OF  
SAN BERNARDINO COUNTY (SMOLIN)  
L.A. 32068

DISSENTING OPINION BY LUCAS, J.

I respectfully dissent to the majority's holding that "defendants [have] not been substantially charged with a crime in Louisiana." My colleagues have ignored the limitations on an asylum state's powers of judicial examination in extradition proceedings established by the United States Supreme Court in *Michigan v. Doran* (1978) 439 U.S. 282.

In *Michigan v. Doran*, the high court held that only four matters may be considered by a court in the asylum state reviewing a request for release on habeas corpus. Those matters are derived from the extradition

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clause<sup>1/</sup> of the United States Constitution (art. IV, § 2, cl. 2) and from 18 United States Code section 3182<sup>2/</sup> implementing the

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1. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

2. "Whenever the executive authority of any State or Territory demands any person as a fugitive from Justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

3.

extradition clause. The court explained that "[w]hatever the scope of discretion vested in the governor of an asylum state . . . , the courts of an asylum state are bound by Art. IV, § 2, cf. *Compton v. Alabama*, 214 U.S. 1, 8 (1909), by § 3182, and, where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition, and (d) whether the petitioner is a fugitive." (439 U.S. at pp. 288-289.)

Because defendants admit that they are the persons who took the children and whose extradition is sought by Louisiana, the only remaining questions are "whether the extradition documents on their face are in order" and "whether the petitioner has been charged with a crime in the demanding state." The extradition documents on their face are in order, and defendants therefore confine their argument to a claim that they are not substantively charged with a crime.

The majority correctly notes that although California courts cannot inquire into the guilt or innocence of a person whose extradition is sought (Pen. Code, § 1553.2), nonetheless extradition documents must "substantially charge the person demanded with having committed a crime" under the laws of the demanding state. (Id., § 1548.2.) (Ante, p. \_\_\_\_ [maj. opn. at p. 11].) My colleagues, however, confuse the question of

whether defendants are substantially charged with a crime with the question of whether defendants are innocent. Whether a person is substantially charged with a crime against the laws of the demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus." (Roberts v. Reilly (1885) 116 U.S. 80, 95, italics added.) "Any other judicial inquiry in the asylum state into the matter exceeds the court's jurisdiction. [Citations.]" (In re Fabricant (1981) 118 Cal.App.3d 115, 120.) By going beyond the "face of the papers," my colleagues probe too far.

The majority notes that People ex rel. Lewis v. Com'r. of Correction (1979) 417 N.Y.S.2d 377, 379-380, held that the asylum state may inquire whether the act alleged in the extradition papers constitutes

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a crime according to the statutory and decisional law of the demanding state.

(Ante, P. \_\_\_\_ [maj. opn. at fn. 9].) This inquiry is necessary in order to discover whether the extradition papers substantially charge the person demanded with having committed a crime under the laws of the demanding state. (See Pen. Code, § 1548.2.) For example, in *Application of Varona* (Wash. 1951) 232 P.2d 923, a case cited by the majority, the extradition documents indicated that defendant was a partner charged with stealing money from his own partnership.

(Ante, p. \_\_\_\_ [maj. opn. at p. 13].) Examination of the statutory and decisional law of the demanding state (California) revealed that the act charged was not in the abstract a crime under California law at that

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time.<sup>3/</sup> When defendants in the instant case argued that the extradition documents did not substantially charge them with the crime of kidnapping because they had authority to take the child, they asked the court to look beyond the extradition documents and the statutory and decisional law of both Louisiana and California to determine the status of the alleged crime in general. Instead, they requested that the court take cognizance of a particular document to determine whether they, individually, were "charged with a crime." That requested consideration clearly involved contemplation of an individual defense to an otherwise permissible charge, something the court has no power to examine in extradition

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3. A later California case, *People v. Sobiek* (1973) 30 Cal.App.3d 458, held that a partner may be guilty of embezzling or stealing partnership property.

proceedings. In sum, defendants are arguing their innocence, not challenging the sufficiency of the extradition request. The California custody order that they offer thus supports an affirmative defense which may be considered only by the Louisiana court, not the California court.

My colleagues conclude that their holding here is in "complete harmony" with *Michigan v. Doran*, supra, because a custody ruling is "at least as verifiable as the other matters referred to in the Supreme Court's opinion. . . ." (Ante, p. \_\_\_\_ [maj. opn. at p. 18].) The majority has put the cart before the horse. What the Supreme Court in *Michigan v. Doran* held was that there are only four matters that can be considered in habeas corpus extradition proceedings. Although the high court added that these four matters "are historic facts readily verifiable" (438 U.S. at p. 289), it

did not hold that a court may consider any other matters (such as asylum state custody rulings or defenses to the crime charged) which may also be considered "historic facts readily verifiable." The four areas of inquiry described by the court were not merely illustrative. They were meant to define and restrict the actual boundaries of permissible inquiry. Thus, the trial court clearly exceeded its jurisdiction in considering the California custody ruling because that was not a matter fully under one of *Michigan v. Doran*'s four categories.

Interstate extradition is meant to be a summary executive proceeding; the extradition clause "never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." (*Michigan v. Doran*, supra, 439 U.S. at p. 283.) Under the constitutional provision,

extradition is not a matter of mere comity, but instead is an absolute right of the demanding state and a duty of the asylum state. (In re Russell (1974) 12 Cal.3d 229, 234.) "[A]n asylum state does not refrain from undertaking an examination of a fugitive's guilt merely to avoid procedural delays or complications in the rendition procedure. Rather it does so in recognition of the principle that such an inquiry 'into the merits of the charge against the prisoner or into the motives which inspired the prosecution in the demanding State . . . exceeds its authority under the constitutional and statutory provisions regulating the extradition of criminals. The mandate of the Constitution requires 'a person charged in any State with a crime' to be delivered by the asylum State to the State whose laws he has violated. That State alone can determine the guilt or innocence of the

offending party.' (In re Kimler (1951) 37 Cal.2d 568, 572.)" (In re Golden (1977) 65 Cal.App.3d 789, 796.) The majority and trial court here have completely ignored the constitutional and statutory limitations on an asylum state's role in requests for extradition.

As noted, Richard's claim of entitlement to sole custody of his children based on a 1981 California custody order<sup>4/</sup> is

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4. On April 11, 1984, in California, Judith initiated an order to show cause to set aside the custody order of February 11, 1981, which awarded sole custody to Richard. The trial court reaffirmed the 1981 order on May 31, 1984. Judith appealed, and the Court of Appeal on rehearing on February 25, 1986, reversed the 1984 order and remanded the matter for further proceedings. Although there now exists a question about the current validity of Richard's 1981 custody order, the order apparently was valid on March 9, 1984, when Richard took his children from Louisiana. In my opinion, the custody order and its questioned validity are not in any event relevant to the resolution of this extradition case, however, because the custody order is not a matter that can be considered in habeas corpus extradition proceedings pursuant to Michigan v. Doran.

an affirmative defense to the kidnapping charge, which must be asserted in a Louisiana court. The asylum state, California, was without jurisdiction to inquire into the guilt or innocence of the person whose extradition was sought; that decision may be reached only by the demanding state. (Pen. Code, § 1553.2, *In re Russell*, supra, 12 Cal.3d at pp. 778-779.) For the foregoing reasons I would hold that the trial court erred in taking judicial notice of the California custody order, and I would grant the petition for writ of mandate.

LUCAS, J.

**BEST AVAILABLE COPY**

A P P E N D I X "B"

SAN BERNARDINO  
District Attorney  
1985 MAR 27 PM 1:50

FILED  
Keeman G. Cassady, Clerk  
March 26, 1985  
COURT OF APPEAL  
FOURTH DISTRICT

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

PEOPLE OF THE STATE  
OF CALIFORNIA

Petitioner,

v.

SUPERIOR COURT OF THE  
STATE OF CALIFORNIA FOR  
THE COUNTY OF  
SAN BERNARDINO,

Respondent;

RICHARD SMOLIN, et al.,

Real Parties  
in Interest.

E001358

Sup. Ct. No.  
SCV 224030

O P I N I O N

ORIGINAL PROCEEDING; petition for a  
writ of mandate. Granted.

(See concurring opinion.)

2.

Dennis Kottmeier, District Attorney  
and Joseph A. Burns, Deputy District Attorney  
for Petitioner.

Albert H. Maldonado for Real Party  
in Interest Richard Smolin.

Chuck Nassin for Real Party in  
Interest Gerard Smolin. No appearance for  
Respondent.

The issue presented by these  
original proceedings is whether a California  
superior court may grant habeas corpus  
relief to a person against whom an  
extradition warrant has been issued by the  
California Governor, when the ground urged  
for issuance of the writ is that an affidavit  
supporting the extradition requests, although  
valid on its face, is factually inaccurate  
because of the affiant's alleged omission to  
include certain pertinent facts.

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STATEMENT OF FACTS

Judy and Richard Smolin were married  
at one time and have two children. Their  
1978 marriage was dissolved in respondent  
superior court. The court awarded custody of  
the children to Judy, with a right of  
reasonable visitation accorded Richard.

In 1980, Judy remarried and moved to  
Texas, taking the children with her. She  
then instituted proceedings in Texas to  
obtain a full faith and credit judgment  
recognizing her custody over the children.

Meanwhile, Richard successfully  
moved the California court for an order  
giving him joint custody of the children. In  
a later proceeding he obtained an order  
giving him sole custody of the children.  
Judy was personally served with both of these  
orders.

Soon thereafter Judy obtained a  
decree in Texas giving full faith and credit

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to the original unmodified California custody order.

Judy and her children then moved to Louisiana, and she began proceedings in that jurisdiction to have the Texas decree recognized. A proceeding was also commenced looking to accomplish adoption of the children by Judy's new husband.

On March 9, 1984, armed with the latest California custody order, Richard and his father, Gerard, "picked up" the children at a school bus stop in Louisiana and brought them back to California. On March 12, 1984, at Judy's instance the Louisiana district attorney filed a bill of information against Richard and Gerard accusing them of kidnapping the two children. Warrants were issued for their arrest pursuant to the charges.

Several days later, Richard and Gerard obtained a writ of prohibition from a

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California superior court which prohibited all law officers in this state from enforcing the warrants.

In May 1984, a hearing was held in respondent superior court on the issue of custody of the children. This hearing was attended by both Judy and Richard, and the children were in California at the time. The court issued an order giving sole custody of the children to Richard, with the right of reasonable visitation accorded Judy.

On June 14, 1984, Governor Edwards of Louisiana executed requisition demands upon Governor Deukmejian for the arrest of Richard and Gerard and their delivery to agents of the state of Louisiana for return to that state. The demand was supported by an affidavit signed by Judy which stated:

"On March 9, 1984, at approximately 7:20 a.m., Richard Smolin and Gerard Smolin, kidnapped Jennifer Smolin, aged 10, and James

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C. Smolin, aged 9, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana.

The affiant has custody of the said children by virtue of a Texas court order dated February 5, 1981, a copy of said order attached hereto and made part hereof. The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmy Huessler of 2015 Dridle Street, Slidell, Louisiana. Richard Smolin and Gerard Smolin were without authority to remove children from affiant's custody."

On August 6, 1984, Governor Deukmejian's extradition secretary confirmed that the warrants would issue against Gerard and Richard on August 13, but would be held until August 23.

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Before that date, Gerard and Richard filed applications for habeas corpus relief with the respondent superior court. At the hearing of this application, held on August 24, 1984, the court found that Judy's affidavit contained misstatements regarding who had custody over the children because it did not refer to the California custody order, with the result that the extradition demand was legally insufficient. The court then granted both Gerard and Richard's application for habeas corpus relief.

Contending that this order constituted an abuse of the respondent court's discretion and exceeded the bounds of its jurisdiction, the People have petitioned this court for a writ of mandate directing the respondent court to vacate its order.

#### DISCUSSION

The People contend that the respondent court has exceeded its authority

in granting the habeas corpus relief to real parties, because the court went beyond the face of the extradition documents and made a determination as to the innocence of real parties. Conversely, real parties argue that the court was authorized to make such an inquiry. Although they couch their arguments in several ways, real parties' basic position is, in considering whether a person is substantially charged with a crime in the demanding state, that a court may inquire into the sufficiency of the affidavit accompanying the warrant, that in this case the affidavit is insufficient, and that therefore, the court properly granted the petition for a writ of habeas corpus.

Article IV, section 2, clause 2 of the United States Constitution provides: "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall

on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." This constitutional provision extends to the demanding state a right and to the asylum state a corresponding duty to deliver the requested fugitive.

"Extradition is not a matter of mere comity between the states. . . . The role of the judiciary in habeas proceedings on extradition is extremely limited. 'Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order, (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition, and (d) whether the petitioner is a fugitive.' (Michigan v. Doran 439 U. S. 282 at p.

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289.)" (In re Fabricant, 118 Cal.App.3d 115, 119-120.) "The courts in a Habeas Corpus proceeding of this kind, where the prisoner is arrested for extradition, cannot go into a trial of the merits of the cause. The proceeding is only an initiatory step to a trial in another State. As to the guilt of the prisoner, they are not allowed to inquire. Their judicial powers are limited to a determination on the sufficiency of the papers and the identity of the prisoner." (In re Kimler, 37 Cal.2d 568, 571 quoting Kurtz v. Florida, 22 Fla. 36, 45.)

Whether an alleged fugitive is substantially charged with a crime is a question of law, which is always open, upon the face of the papers, to judicial inquiry, on an application for discharge under a writ of habeas corpus. (Roberts v. Reilly, 116 U.S. 80, 95.) "Any other judicial inquiry in the asylum state into the matter exceeds the

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court's jurisdiction. [Citations.]" (In re Fabricant, supra, 118 Cal.App.3d 115, 120.)

Real parties attack the sufficiency of the affidavit on several grounds. First, citing Ex parte Spears, 88 Cal. 640, they argue that the affidavit is insufficient because Judy stated merely that she believed that Richard and Gerard had committed the kidnap rather than stating that she knew they had. In Ex parte Spears, supra, the petitioner had been arrested in California by virtue of a warrant issued by the Governor in compliance with a requisition from the Governor of Alabama. Petitioner applied to the court for a discharge from imprisonment on a writ of habeas corpus. The affidavit accompanying Alabama's requisition stated that the affiant "has reason to believe and does believe" that Spears (the petitioner) had embezzled a carload of mules. The court

granted petitioner's application for discharge on the ground that the affidavit was insufficient to support an issuance of a warrant. It held: "[A] mere affidavit in the form of an information, containing no evidence, and followed by no deposition stating any fact tending to show guilt, is insufficient to support a warrant." (Id. at p. 642.)

Unfortunately for real parties, under Louisiana law the language of the affidavit used in describing the charge of simple kidnap cannot be characterized as "insufficient" for purposes of the inquiry here. Louisiana Code of Criminal Procedure, article 465 provides:

"A. The following forms of charging offenses may be used, but any other forms authorized by this title may also be used.

". . . . .

"30. Simple Kidnapping -- A.B. Kidnapped C. D."

In other words, under Louisiana law, it is enough, in terms of sufficient pleading of this criminal offense, simply to say "A.B. kidnapped C.D." Judy's affidavit contains such a statement. Thus Spears is distinguishable on the sufficiency of the affidavit and therefore not controlling.

Real parties next argue that under Louisiana law<sup>1/</sup> a parent cannot be substantially charged with kidnap of his or her child if he or she has custody of the child. Relying upon Application of Varona,

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1. The pertinent Louisiana statute provides: "Simple Kidnap is:

"(4) The intentional taking, enticing or decoying away and removing from the state, by any parent, of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the child."

14.

232 P.2d 923, they contend that the warrant was properly [sic] granted because Richard had custody of the children which means that a necessary element of the crime is absent from the face of the documents. They reach this conclusion by positing that if Judy had informed the authorities in her affidavit that Richard had a competing custody order for the children from California, the absence of the necessary element would have been obvious. Such is not the case.

In Application of Varona, supra, 232 P.2d.923, Pedro Varona was charged in Stockton, California, with the crime of feloniously taking money from a partnership of which he was a member. The California Governor sought the extradition of Varona from the State of Washington. The Washington court found that he was not substantially charged with a crime, because, according to California law, a partner could not be guilty

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of theft of the funds of a partnership of which he was a member.

The charging document on its face stated that Varona stole money from a partnership of which he was a member. Thus, on its face, in view of substantive California law, it was an insufficient characterization of the purported criminal charge.

The only case cited by real parties to support their position that under Louisiana law a parent cannot be guilty of kidnapping his or her child if he or she has a custody order is State v. Elliott (1931) 171 La. 306, 131 So. 28, 77 ALR 314. Elliott is not controlling in the present situation, however, because it concerned a situation wherein a father took a child from its mother shortly after they parted. At the time no separation or divorce proceeding had been filed by either, and no order of court had

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been rendered awarding custody of the child to either spouse. (Id., at p. 29.)

Richard's claim that he has superior rights to the custody of the children by way of his California custody order is simply a defense to the charged crime. As such he will have to present it to the Louisiana courts for a determination of the validity of his position. The fact that he has such a defense does not invalidate the charging papers.

Although we abhor Judy's apparent willingness to take advantage of our federal system to further this custody battle, and are sympathetic to real parties' position, we must conclude that their arguments are irrelevant to the only issue a court in the asylum state may properly address: are the documents on their face in order. Real parties' insistence that they have committed

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no crime will have to be demonstrated in Louisiana. They have not shown here that the extradition documents on their face are improper, and neither we nor the court below is authorized to consider the merits of their defenses.

The assertion made by real parties here that they are not substantially charged with a crime because they are innocent is similar to the one considered in Drew v. Thaw, 235 U.S. 432, wherein Justice Holmes noted: "But this is not Thaw's trial. In extradition proceedings, even when, as here, a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. . . . There is no discretion allowed, no inquiry into motives. [Citations.] The technical sufficiency of the indictment is not open. [Citations.]

18.

And even if it be true that the argument stated offers a nice question, it is a question as to the law of the [demanding state] which the [demanding state] must decide." (Id. at pp. 439-440.)

We remain curious as to why Governor Deukmejian's office has apparently declined to inform the Louisiana authorities about the latest California award of custody in a proceeding in which Judy personally participated. If there has been such transmission of information, our perplexity yet remains over what good purpose would be served in pursuing this matter as a criminal case. Certainly real parties acted rashly, but to put them through a criminal trial when, on all the facts, it seems apparent that no crime has been committed suggests to us a perversion of the federal system.

Nevertheless, having faithfully applied the law here applicable as we see it,

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we can only trust that the courts of Louisiana will do the same when all the facts are there revealed.

DISPOSITION

The petition is granted and the court is directed to set aside and vacate its orders of August 24 and August 30, 1984, in case no. SCV-224030, and to enter new and different orders denying the petitions of Richard Smolin and Gerard Smolin for writs of habeas corpus.

/s/ McDaniel  
J.

I concur:

/s/ Kaufman  
J.

People v. Superior Court (Smolin), E001358

I concur in the result and in most of the court's opinion. However, I do not agree with the personal views expressed by the majority.

MORRIS

---

P.J.

A P P E N D I X "C"

SUPERIOR COURT OF THE

STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

DEPARTMENT NO. 1

HON. WILLIAM PITT HYDE, JUDGE

In re GERALD J. SMOLIN and )	
RICHARD SMOLIN on )	
Habeas Corpus, )	SCV-224030
)	
Petitioners. )	E001358
)	

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REPORTER'S TRANSCRIPT OF

ORAL PROCEEDINGS

Friday, August 24, 1984

\* \* \*

THE COURT: Well, I would only -- I will take judicial notice of the California family law file, and, as part and parcel of that, I would note that the Court in the consideration of that case indicated at the conclusion of that hearing that:

"The Court would further find that his attempts--" referring to Mr. Pope excuse

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me, referring to Mr. Richard Smolin, "That his attempts at this --" to exercise visitation, "were frustrated by direct and deliberate acts on the part of Mrs. Pope, and those acts were taken with full acquiescence at least, and perhaps under the direction or dominance exercised over her by Mr. Pope.

"I don't think it is any secret in an evaluation of the testimony of the witnesses in this case that Mr. Pope has exercised a dominant aura of influence in this family structure. He has exercised that aura of influence and domination over at least the children and probably to some extent over Mrs. Pope.

"The history of the transfers to Oregon, to Texas, to Louisiana all would indicate that his role was not one of a husband acquiescing in the expressed or dominant desires of the wife, but were probably at least in concert with hers. And

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that he has little if any regard for Mr. Smolin; he has little if any regard for the right of Mr. Smolin to exercise parental guidance and control and sharing and control and custody of his children. And he was an active participant in what the Court has concluded and does conclude was a deliberate and longstanding effort to deprive him of his parental rights.

"Mrs. Pope, from the standpoint of evaluation of witnesses and credibility and testimony, appeared to the Court to be an extremely bright and intelligent woman. She obviously would have to be. She could not maintain the lifestyle and degree of personal development that she has had if she did not have that innate intelligence. So she cannot plead ignorance.

"And the Court had great difficulty in accepting her testimony that when these children would make inquiry, 'Why doesn't dad

4.

call us? Why doesn't dad write us?' that her only response was, 'I don't know.' No one of any limited degree of intelligence could fail to recognize that in those questions to her by the children, there was an inherent plea on the part of the children to let us have contact with dad, let us -- let us establish a relationship.

"And yet she failed to do that. She failed to do it for whatever reasons she had, either vindictiveness against Mr. Smolin or fear that he would somehow achieve a right of relationship which would deprive her somehow of her -- her custody and control of these children.

"The adoption process in Louisiana I can only describe as being verging on the fraudulent. There is -- to go to the agencies and represent that the father has failed to support and failed to communicate would indicate to some government agency

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handling a case on the routine that they do, probably that phrased that way, it meant that dad had no interest in supporting and dad had no interest in establishing communications. And yet the history of this case shows that interest was always there."

The Court would conclude that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an interest of the State of Louisiana.

The Court would grant the writ of habeas corpus and order the discharge of Mr. Gerard Smolin and Richard Smolin.

(The proceedings were concluded at this time.)

A P P E N D I X "D"

SUPREME COURT

FILED

JUN 5, 1986

LAURENCE P. GILL, CLERK

ORDER DUE  
JUNE 30, 1986

ORDER DENYING REHEARING

LA No. 32068

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

---

PEOPLE  
Petitioner

v.

SAN BERNARDINO SUPERIOR COURT,  
Respondent  
RICHARD SMOLIN, ET AL.  
REAL PARTIES IN INTEREST

---

\_\_\_\_\_Petition  
for rehearing DENIED.

Lucas, J. and Panelli, J.,  
are of the opinion the petition should  
be granted.

[s] Bird  
Chief Justice

A P P E N D I X "E"

APPENDIX E

## California Penal Code section

1548.2:

No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime

under the law of that State;  
and the copy of indictment,  
information, affidavit,  
judgment of conviction or  
sentence must be certified as  
authentic by the executive  
authority making the demand.

(See section 3 of the Uniform Criminal  
Extradition Act, 11 Uniform Laws  
Annotated.)

# California Penal Code section

1550.1:

No person arrested upon  
such warrant shall be  
delivered over to the agent  
of the executive authority  
demanding him unless he is  
first taken forthwith before  
a magistrate, who shall  
inform him of the demand made  
for his surrender, and of the  
crime with which he is  
charged, and that he has the  
right to demand and procure  
counsel. If the accused or  
his counsel desires to test  
the legality of the arrest,  
the magistrate shall remand  
the accused to custody, and  
fix a reasonable time to be  
allowed him within which to  
apply for a writ of habeas  
corpus. If the writ is  
denied, and probable cause  
appears for an application  
for a writ of habeas corpus  
to another court, or justice  
or judge thereof, the order  
denying the writ shall remand  
the accused to custody, and  
fix a reasonable time within  
which the accused may again  
apply for a writ of habeas  
corpus. When an application  
is made for a writ of habeas  
corpus as contemplated by  
this section, a copy of the  
application shall be served  
as provided in Section 1475,  
upon the district attorney of

the county in which the accused is in custody, and upon the agent of the demanding state. A warrant issued in accordance with the provisions of Section 1549.2 shall be presumed to be valid, and unless a court finds that the person is not the same person named in the warrant, or that the person is not a fugitive from justice, or otherwise subject to extradition under Section 1549.1, or that there is no criminal charge or criminal proceeding pending against the person in the demanding state, or that the documents are not on their face in order, the person named in the warrant shall be held in custody at all times, and shall not be eligible for release on bail.

(See section 10 of the Uniform Criminal Extradition Act, 11 Uniform Laws Annotated.)

# California Penal Code section

1553.2:

The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime.

(See section 20 of the Uniform Criminal Extradition Act, 11 Uniform Laws Annotated.)

DECLARATION OF SERVICE BY MAIL

Case Name: People of the State of  
California v. Superior  
Court of the State of  
California, for the  
County of San Bernardino  
(Richard Smolin and Gerard  
Smolin, Real Parties in  
Interest.)

Court No. 86-

(Service Pursuant to United States  
Supreme Court, Rule 28(5)(c))

I declare that I am employed  
in the County of Sacramento,  
California. I am 18 years of age or  
older and not a party to the within  
entitled cause; my business address is  
1515 "K" Street, Suite 511, P.O. Box  
944255, Sacramento, California 94244-  
2550.

On August 29, 1986, I served  
the attached PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA, in said cause, by  
placing a true copy thereof enclosed in  
a sealed envelope with postage thereon  
fully prepaid, in the United States  
mail at Sacramento, California,  
addressed as follows:

Laurence P. Gill, Clerk  
California Supreme Court  
360 McAllister Street, Room 4050  
San Francisco, California 94102

Dennis P. Riordan  
Attorney at Law  
523 Octavia Street  
San Francisco, California 94102

Declaration of Service by Mail  
(continued)

Chuck Nacsin, Esq.  
357 W. Second St., Ste. 7  
San Bernardino, California 92401

Dennis Kottmeier  
District Attorney  
San Bernardino County  
316 North Mt. View Avenue  
San Bernardino, California 92415  
Attn: JOSEPH A. BURNS,  
Deputy District Attorney

Office of the Clerk  
California Court of Appeal  
Fourth Appellate District  
Division Two  
303 W. Third Street, Rm. 640  
San Bernardino, California 92401

Hon. David L. Baker, Clerk  
County of San Bernardino  
351 N. Arrowhead Ave., 2nd Floor  
San Bernardino, CA 92415-0210

I declare under penalty of perjury that all parties required to be served have been served, and the foregoing is true and correct and that this declaration was executed at Sacramento, California, on August 29, 1986.

---

(Signature)

(3)  
No. 86-381

FILED

NOV 4 1986

JOSEPH E. SEANIG, JR.  
CLERK

# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF CALIFORNIA,  
*Petitioner,*

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
FOR THE COUNTY OF SAN BERNARDINO,  
*Respondent,*

RICHARD SMOLIN AND GERARD SMOLIN,  
*Real Parties in Interest.*

**BRIEF OF REAL PARTIES IN INTEREST  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

DENNIS P. RIORDAN  
RIORDAN & ROSENTHAL  
523 Octavia Street  
San Francisco, CA 94102  
(415) 431-3472  
*Attorney for Real  
Parties in Interest*

64/12/86

i.

QUESTION PRESENTED

Should this Court overturn a judgment barring the extradition of a party who, as a matter of law, cannot be validly charged with the offense for which his extradition is sought?

ii.

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iii.

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1.

NO. 86-381

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA, )

Petitioner, )

vs. )

Superior Court of the State of )  
California, For the County Of )  
San Bernardino, )

Respondent, )

RICHARD SMOLIN AND GERARD SMOLIN, )

Real Parties in Interest. )

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BRIEF OF REAL PARTIES IN INTEREST IN  
OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

This extradition case is not without  
considerable interest. Its facts are  
quite unusual, and one lower court which

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ordered extradition suggested its own decision was "a perversion of the federal system".<sup>1</sup> The very aspects of the case which have attracted attention, however, render it unsuitable for review by this Court. Its unique facts mean that the carefully tailored decision of the California Supreme Court barring extradition will have little or no impact on federal law or the functioning of the extradition process among the fifty states.<sup>2</sup> Furthermore, without doing violence to well-established principles of extradition law, the decision below prevents the use of knowingly false statements in this

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<sup>1</sup>/See Petitioner's Appendix (hereafter "Pet. App.") B, at 18. Petitioner's Appendix B is a copy of the decision of March 26, 1985 by the California Court of Appeal, Fourth District, Second Division, ordering the extradition of Real Parties In Interest Richard and Gerard Smolin (hereafter "the Smolins") to Louisiana to face charges of kidnapping Richard's children, Jennifer and Jamie.

<sup>2</sup>/That decision, rendered on May 1, 1986 and (cont.)

3.

proceeding to gain advantage in a related child custody matter, a most compelling reason for leaving the ruling of the California Supreme Court intact.

Briefly stated, this case involves a charge of kidnapping filed in Louisiana against Richard Smolin and his father Gerard, who are California residents. The purported victims were Richard's two children, Jennifer and Jamie. The charge was baseless, because at the time of the alleged crime, Richard was the sole legal custodian of his children under a valid order issued by the only court empowered to determine the custody arrangements of the Smolin children. More importantly, the kidnapping prosecution was grounded on what can fairly be characterized

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2. (Cont.)

reported at 41 Cal.3d 758, 716 P.2d 991, is attached to California's petition (hereafter "Pet.") as Appendix A.

4.

as perjury: a declaration under oath by Judith Smolin Pope, Richard's ex-wife and the mother of Jennifer and Jamie, that Richard had no legal claim to custody of the children, an assertion Judith knew to be untrue at the time she made it.

Although the California Court of Appeal "abho[red]" this improper use "of our federal system to further this custody battle . . .", it felt constrained by the constitutional prohibition on a general inquiry during extradition proceedings into guilt and innocence to order the Smolins' return to Louisiana (Pet. App. B, at 16). The California Supreme Court, well aware of the same constitutional strictures, did not permit the Smolins to challenge their extradition through a broad claim of innocence nor did it approve an evidentiary hearing on that question. Rather, it found

5.

that the Smolins were not and could not be "substantially charged" with the offense of kidnapping Richard's children. In so doing, it relied on nothing more than the charging documents in the case and certain relevant legal orders, of which it took judicial notice. Since a lack of "substantial charging" has long been recognized as a constitutionally valid basis upon which to challenge an extradition order, and since judicial notice traditionally has been utilized to determine whether a party facing extradition has been substantially charged, the decision below is both legally sound and indisputably just.

#### STATEMENT OF THE CASE

Richard and Judith Smolin were divorced in 1978 by the San Bernardino Superior Court in California. Judith was given custody of their two children, with reasonable

6.

visitation rights granted to Richard, who has remained a California resident since that time. As part of its dissolution agreement Judith agreed not to take the children from California without the consent of Richard.<sup>3</sup>

After remarrying, Judith violated the dissolution agreement by taking the children to Oregon without notice to Richard. During the next two years she moved the children from Oregon to Texas, then from Texas to Louisiana, each time concealing their location from Richard for varying periods of

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<sup>3</sup>/See Appendix A, attached to this brief (hereafter Smolin App. A), portions of an opinion of the California Court of Appeal, Fourth Appellate District, Second Division, issued on February 25, 1986. In Re the Marriage of Smolin, E001146, at page 3. This opinion is referred to in California's petition for certiorari at 9-11 n. 5, and was cited in the decision below. (Pet. App. A, Lucas dissenting, at 11 n. 4.)

7.

time, thereby deliberately frustrating his visitation rights.<sup>4</sup>

In 1980, Richard moved for and obtained a joint custody order from the San Bernardino Superior Court (Pet. App. B, at 3), the only judicial forum empowered to modify the 1978 custody decree (see Argument I, infra). When Judith refused to honor the specific visitation rights provided to Richard in that joint custody order, on February 27, 1981 Richard obtained from the same court an order granting him sole custody of his children (Pet App. A, at 4; Smolin App. A, at 5). Judith was personally served in both of these modification proceedings (Pet. App. A, at 3-4; Pet. App. B, at 3).

For almost two years after obtaining sole custody of his children, Richard was

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<sup>4</sup>/See Smolin App. A, at 3-6.

8.

unable to locate them, because Judith had moved them from Texas to Louisiana without informing Richard of their whereabouts (Smolin App. A, at 6). After Richard did learn their location and began to write and call them, Judith and her new husband James Pope filed a Louisiana adoption action aimed at severing Richard's parental rights and making Mr. Pope the legal father of Jennifer and Jamie Smolin (Smolin App. A, at 7). That action later was found to verge "on the fraudulent," a fair characterization, as Judith represented in the adoption proceeding that Richard had no interest in supporting and establishing communications with his children, and "yet the history of this case shows that interest was always there." (Pet. App. C, at 4-5.)

On March 9, 1984, confronted with the possibility that his relationship with the

9.

children he loved might be declared a legal nullity, and "armed with the latest California custody order, Richard and his father, Gerard, 'picked up' the children at a school bus stop in Louisiana and brought them back to California" (Pet. App. B, at 4).

On April 11, 1984, Judith submitted to the jurisdiction of the San Bernardino Superior Court, and filed a motion to modify the court's 1981 order granting Richard sole custody of Jennifer and Jamie Smolin (Pet. App. A, at 7; Smolin App. A, at 9). Despite this recognition of the existence of the California order granting full custody of the children to Richard, on April 30, 1984, Judith swore under penalty of perjury before a judge in Louisiana that on March 9, 1984 "Richard Smolin and Gerard Smolin [had been] without authority to remove children from affiant's custody" (Pet. App., at 5-6, Pet.

10.

App. B, at 5-6). That affidavit, which accompanied and served as the basis for Governor Edwards' demand for the Smolins' extradition, never mentioned the California decrees under which Judith received custody of Jennifer and Jamie in 1978, nor the 1980 and 1981 modification orders granting Richard joint, and then sole, custody of his children (id.).

On May 31, 1984, the San Bernardino Superior Court denied Judith's motion to modify custody and reaffirmed its 1981 order granting Richard sole custody of his

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11.

children.<sup>5</sup> Two weeks later, Governor Edwards executed his requisition demand for the arrest and extradition of the Smolins based on the aforementioned affidavit of Judith which falsely claimed Richard had no authority to take custody of his children (Pet. App. B, at 5-6). On August 23, 1984,

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5/It was this order, as well as the file on which it was based, which the same court judicially noticed on August 24, 1984, in granting the Smolins a writ of habeas corpus barring their extradition to Louisiana (Pet. App. C). Judith's appeal of this reaffirmation of the 1981 custody order produced the appellate decision attached as Smolins' Appendix A. On appeal, Judith argued: a) that the 1981 sole custody order was invalid at the time it was issued; and b) that the Superior Court should not have reaffirmed that order in May of 1984. The Court of Appeal explicitly found that the 1981 sole custody order was valid (Smolin App. A, at 10-20). It then proceeded to consider "the order of May 31, 1984, 'reaffirming' the sole custody in Richard which was granted under the order of February 27, 1981" (id., at 23). It reversed and remanded that order, directing the trial court to consider whether a joint custody order would be more appropriate (id., at 23-24).

12.

Governor Deukmejian of California issued extradition warrants against the Smolins (Pet. App. B, at 6).

On August 24, 1984, the San Bernardino Superior Court issued a writ of habeas corpus barring the extradition of the Smolins (Pet. App. C). That order was overturned reluctantly by the California Court of Appeal. Although believing itself powerless to do other than surrender the Smolins to Louisiana, the majority commented:

We remain curious as to why Governor Deukmejian's office has apparently declined to inform the Louisiana authorities about the latest California award of custody in a proceeding in which Judy personally participated. If there has been such transmission of information, our perplexity yet remains over what good purpose would be served in pursuing this matter as a criminal case. Certainly real parties acted rashly, but to put them through a criminal trial when, on all the facts,

13.

it seems apparent that no crime has been committed suggests to us a perversion of the federal system.

(Pet. App. B, at 18) (emphasis in original).

On May 1, 1986, the California Supreme Court overturned the Court of Appeal decision and barred the extradition of the Smolins. The Court recognized that it could not make a general inquiry into the Smolins' guilt or innocence (Pet. App. A, at 19). The Court quite sensibly noted, however, that the obvious innocence of the Smolins should not serve to defeat an otherwise well-founded challenge to their extradition (id., at 18-19). Taking judicial notice of the California decisions in the Smolin custody matter, the Court found the Smolins were charged in the extradition papers with kidnapping children of whom Richard was legal custodian. Since those allegations do not

14.

state a crime under Louisiana law, the Court concluded the Smolins were not substantially charged and could not be extradited.

REASONS FOR DENYING THE WRIT

I

AS A MATTER OF LAW, THE SMOLINS  
CANNOT BE VALIDLY CHARGED OR  
CONVICTED OF THE KIDNAPPING OF  
JENNIFER AND JAMIE SMOLIN

The issue now in dispute between California and the Smolins is indeed specific and narrow, as most elements of the claim upon which the Smolins prevailed in the court below are presently uncontested. To begin, it is agreed that an individual is entitled to judicially challenge his impending extradition on the ground the extradition documents themselves establish, as a matter of law, that he cannot be validly charged and convicted of the crime of which he is accused in the demanding state. See Pet., at 19,

15.

citing Roberts v. Reilly, 116 U.S. 80, 95 (1885) (Issue of substantial charge under laws of demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus").<sup>6</sup>

There is also no dispute that the crime of which the Smolins are charged in Louisiana -- the kidnapping of Richard's children -- cannot be committed by a parent "to whom custody has been awarded by any court of competent jurisdiction of any state," since the crime is defined as the taking of children from their legal custodian. See

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<sup>6</sup>/The Uniform Criminal Extradition Act, to which both California and Louisiana subscribe, also requires that an extradition demand be accompanied by documents which substantially charge a crime under the law of the demanding state. (Pet. App. A, at 14-15.)

16.

Louisiana Revised Statutes (hereafter R.S.A.) §14.45(4). California agrees that extradition may be successfully challenged in the courts of the asylum state when the requisition documents themselves allege or reveal facts which establish that the alleged fugitive has committed no crime under the laws of the demanding state.<sup>7</sup>

Consequently, had the extradition papers from Louisiana either alleged, or revealed facts sufficient to establish, that Richard was the legal custodian of his children in March of 1984, the courts of California concededly would have been entitled, if not obligated, to block the Smolins' extradition.

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<sup>7</sup>/See California's discussion, at pages 21 and 22 of its petition, of Application of Varona, 232 P.2d 923 (Wash. 1951). Varona was relied on by the California Supreme Court in blocking the Smolins' extradition. (Pet. App. A, at 20-21.)

17.

Furthermore, although California considers the question irrelevant, there can be no question that Richard was the sole legal custodian of his children in March of 1984. He was so under a valid order of the San Bernardino Superior Court, the court which issued the Smolins' original divorce and custody decree in 1978. Under the Uniform Child Custody Jurisdiction Act, to which both Louisiana<sup>8</sup> and California subscribe, California maintained exclusive continuing jurisdiction to modify the 1978 order, as it did in 1981 by granting Richard

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<sup>8</sup>/See, e.g., Wachter v. Wachter, 439 So.2d 1260 (La. App. 5th Cir. 1983).

18.

sole custody of his children.<sup>9</sup>

Furthermore, as the California Supreme Court explained, Congress has now preempted this field: under the terms of the Parental Kidnapping Prevention Act of 1980 (28 U.S.C. §1738A), Richard's 1981 sole custody order is binding on, and must be judicially noticed by, all other states (see Pet. App. A, at 31-33).

It thus appears that the parties agree that had the Louisiana extradition papers

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9/"Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside." Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA, 14 Fam. L.Q. 203, 214-15, cited with approval in Kumar v. Superior Court, 32 Cal.3d 689, 696 (1982). See also Smolin App. A, at 14-15. Federal law is to the same effect. 28 U.S.C. §1738A(d).

19.

mentioned the California custody decrees, the issuance of a writ of habeas corpus barring the extradition of the Smolins to Louisiana would have been wholly unobjectionable, since the California courts then could have determined as a matter of law "upon the face of the papers" that the Smolins were not substantially charged with a crime. The papers, of course, did not mention either the 1978 California decree or the 1981 modification of it. Instead, they contained Judith's sworn statement on April 31st of 1984 that Richard had had no authority to take custody of the children in Louisiana,

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a statement Judith had to know was false at the time she made it.<sup>10</sup>

This, then, is the nub of this matter: was the San Bernardino Superior Court required in August of 1984 to order the extradition of the Smolins based on an affidavit its own orders demonstrated was knowingly false? Or could it, by taking notice of those orders, find as a matter of law that the Smolins were not substantially charged with a crime under the law of Louisiana? It is to that issue that we now turn.

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<sup>10</sup>/The extradition papers did allege that Judith had legal custody of the Smolin children under a 1981 Texas decree, which in fact merely gave full faith and credit to her 1978 California custody order. The Texas decree thus was founded on the original California order and could not affect the validity of the later 1981 California order modifying the 1978 decree so as to give Richard sole custody of his children.

## II

THE CALIFORNIA COURTS ACTED CORRECTLY  
IN TAKING JUDICIAL NOTICE OF THEIR  
OWN ORDERS IN DECIDING WHETHER THE  
SMOLINS WERE SUBSTANTIALLY CHARGED  
UNDER THE LAWS OF LOUISIANA

California does not deny that the taking of judicial notice is appropriate when deciding whether an alleged fugitive is validly charged under the law of the demanding state. To the contrary, "[t]hat a court may judicially notice the law of the demanding state in determining if the fugitive is substantially charged is not disputed." Pet., at 21 (emphasis in original).

Consequently, California apparently agrees that if a Louisiana domestic relations decision had made clear that Richard was the legal custodian of his children on March 9, 1984, the California courts could have taken judicial notice of that order and determined

22.

that the Smolins were not and could not be substantially charged with kidnapping Jennifer and Jamie. There is no logical reason why California must ignore its own lawful orders in deciding the same question. As the California Supreme Court noted, federal law requires that, sooner or later, the 1981 California decree be judicially noticed in resolving the issue of the Smolins' culpability on the kidnapping charge. (Pet. App. A, at 33.)

California objects that the California courts permitted "the introduction of extrinsic evidence tending to establish innocence in the asylum state" (Pet., at 15), an act prohibited in an extradition proceeding.<sup>11</sup> That characterization of

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<sup>11</sup>/See also Brief of Amici Curiae In Support Of Petition For Writ Of Certiorari, at 3-4.

23.

both extradition law and the decision below is misleading.

The introduction of extrinsic evidence is not absolutely prohibited in an extradition proceeding, although the summary nature of such proceedings severely limits the issues upon which such evidence can be offered. California concedes that an extradition warrant can be challenged through habeas corpus on the ground that the petitioner is not the person named in the extradition request or was not in the demanding state at the time the alleged crime was committed. Pet., at 16-23. See also Michigan v. Doran, 439 U.S. 282, 288-89 (1978). Yet adjudication of either of these issues requires the admission of evidence, conceivably voluminous, outside the extradition papers. Furthermore, such evidence, while introduced to prove one fact

24.

-- mistaken identity or lack of fugitivity -- equally proves another: innocence of the crime charged. See, e.g., Hyatt v. Corkran, 188 U.S. 691, 719 (1903) (Petitioner, by proving he was not in demanding state at time of alleged crime, established he was not a fugitive subject to extradition). The fact that evidence admitted for a purpose proper under extradition law also tends to prove innocence does not prohibit its consideration.

The parties agree that the issue of whether the Smolins were substantially charged is one of law, and must be disposed of without the introduction of external evidence relating to a factual defense. The issue of whether Richard was his children's legal custodian on May 9, 1984 is also one of law, however. The use of judicial notice to bring before a court deciding the issue of

25.

"substantial charging" legal orders relevant to that question was entirely within the limited scope of extradition proceedings.

### III

AS WITH ANY TYPE OF JUDICIAL ACTION,  
A COURT DECIDING AN EXTRADITION MATTER  
MUST BE EMPOWERED TO PREVENT FRAUD

By the time the San Bernardino Superior Court confronted the Smolins' petition to block their extradition in August of 1984, it knew the affidavit accompanying the requisition papers was, at best, grossly misleading and, at worst, perjurious. That affidavit by Judith Smolin Pope stated Richard and Gerard in March of 1984 were without legal custody to take custody of Jennifer and Jamie, yet months before Judith had recognized and lost a challenge to Richard's 1981 sole custody order in the very court confronted with her sworn statement that no such decree existed.

26.

To create an unlimited "fraud" exception to the ban in extradition proceedings on full fledged inquiries into guilt and innocence admittedly would be unwieldly: any defendant could delay extradition by demanding a full evidentiary hearing on his claim that the allegations against him were based on perjured testimony. The spectre of such procedural gamesmanship is in no way raised by the opinion below, however. If a defendant's claim of fraud requires the taking of testimony or the resolution of evidence in conflict, he must be relegated to the remedies available in the courts of the demanding state. On the other hand, no court should be obligated to issue an order which its own records reveal would promote fraud. That is the extraordinary situation in which the San Bernardino Superior Court found itself. The California courts acted

27.

correctly in refusing extradition in this highly unusual set of circumstances.

#### IV

THE DECISION BELOW IS LIMITED  
TO ITS FACTS AND WILL HAVE NO  
APPRECIABLE IMPACT ON THE LAW  
OF EXTRADITION

The decision of the California Supreme Court does not broaden the permissible scope of extradition proceedings. Its significance lies only in the justice it so obviously worked in the unique circumstances of the Smolins' case.

The opinion below specifically holds that an extraditee may not challenge his extradition from the asylum state on the grounds that he did not commit the act or possess the state of mind required to commit the charged offense (Pet. App. A, at 19). It does not approve the introduction of any form of evidence other than that of court orders

which can be judicially noticed, and are thus "historic facts readily verifiable."

Michigan v. Doron, 439 U.S. at 289. It is difficult to imagine a case factually different than the extraordinary one at bar to which the decision below could apply.

California argues that the opinion below will enable those accused of stealing automobiles to resist extradition by claiming they possess "pink slips". (Pet., at 34 n. 13.) The analogy is false, since the simple existence of a "pink slip," which can be fraudulently obtained, cannot conclusively establish ownership. The true analogy would be to a party who fairly litigates his right to an automobile in state A. After losing his suit, he travels to state B and swears out a false affidavit in support of extradition to the effect that his legal adversary, rather than gaining the car in

question through a valid court order of state A, stole it from the declarant while in state B. It is only in such an extraordinary situation that the opinion below could be invoked, allowing the courts of state A to prevent a blatant fraud and miscarriage of justice. This Court need have no quarrel with that result.

#### CONCLUSION

This case does not involve the question of whether the Smolins committed a crime in Louisiana or whether they validly can be convicted for it. They did not, and they cannot. Rather, what is at issue is whether they must suffer the enormous financial and emotional burden of extradition to a foreign state to stand trial on a charge deemed groundless by every judge who has had a

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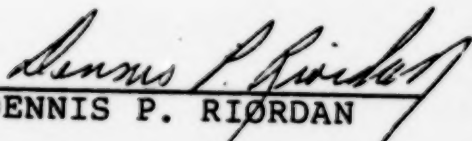
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meaningful chance to consider it.<sup>12</sup> The decision below avoids that patently unfair result while doing no damage to the law of extradition. It should be left undisturbed, and California's petition for certiorari should be denied.

DATED: October 29, 1986

Respectfully submitted,  
RIORDAN & ROSENTHAL

BY   
DENNIS P. RIORDAN

Attorney for Real  
Parties In Interest

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<sup>12</sup>/The dissenting opinion in the California Supreme Court acknowledged that on March 9, 1984 Richard had a valid sole custody order. (Pet. App. A, Lucas dissenting, at 11 n. 4.)

A P P E N D I X "A"

1.

FILED  
Keeman G. Cassady, Clerk  
February 25, 1986  
COURT OF APPEAL  
FOURTH DISTRICT

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

In re the Marriage of	)
RICHARD SMOLIN AND JUDITH SMOLIN	)
-----	)
	)
RICHARD SMOLIN,	)
	)
Respondent,	) E001146
	)
v.	) Sup.Ct.No.
	) FL 30380
JUDITH SMOLIN POPE,	)
	) OPINION
Appellant.	) ON
_____	) REHEARING

APPEAL from the Superior Court of San  
Bernardino County. William Pitt Hyde, Judge.  
Reversed.

Don A. Haskell for Appellant.

2.

Riordan & Rosenthal, Dennis P. Riordan and Albert H. Maldonado for Respondent.

Judith Smolin Pope appeals from an order confirming a prior order granting sole custody to her former husband, Richard Smolin, and terminating child support.

FACTS

The parties were married in San Bernardino County. The two minor children, Jennifer Leann, born May 31, 1973, and Jamie Christopher, born October 16, 1974, resided in San Bernardino County until November 1979, when Judith removed them from the State of California.

Judith and Richard obtained a final judgment of dissolution of their marriage on April 6, 1978, in the San Bernardino Superior Court. The judgment provided that custody of the minor children was awarded to Judith with rights of reasonable visitation to Richard.

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In August of 1979, Judith was married to her present husband, James Pope, and in November of 1979 she moved with Mr. Pope and the minor children to Oregon. Judith did not advise Richard of her intent to move to Oregon until after she had moved, although she had agreed as a part of their settlement agreement not to leave the state without his consent. Richard received notice of the move about a week after it had occurred.

Thereafter, Mr. Pope, who was in the construction business, was offered a position in Dallas, Texas and the family moved to Texas in January of 1980. Again Judith did not inform Richard, and he did not learn of their whereabouts until several months later.

On September 15, 1980, Judith commenced a proceeding in Texas for judicial notice of the California statutes and the California

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judgment. Richard was served but did not appear in that action.

Thereafter, on October 3, 1980, Richard filed an order to show cause in the San Bernardino Superior Court to modify custody. Judith was served but did not appear. Richard did not advise the California court that a proceeding had been commenced in Texas. On October 27, 1980, Richard obtained an order modifying custody and awarding him joint custody but with primary care remaining with Judith. Richard was granted custody during summer vacations and during the Christmas vacation of 1980. Judith's Texas attorney was served with a copy of this order. He advised Richard's attorney that it was his opinion the order was not enforceable in Texas due to lack of jurisdiction in the California court. On January 9, 1981, Richard brought an order to show cause

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against Judith for contempt of the 1980 joint custody order. He also sought a modification granting him sole custody.

On February 13, 1981, the Texas court issued a decree extending full faith and credit and confirming that Judith had custody of the minor children. There is nothing in the record to show whether Judith's attorney had advised the Texas court of the joint custody or that an order to show cause had been filed in the California court.

On February 27, 1981, the San Bernardino Superior Court found that Richard had been denied Christmas visitation rights provided in the 1980 joint custody order and granted him sole custody of the children, subject to Judith's right to reasonable visitation. The court also terminated child support.

Richard did not then seek to obtain physical custody of the minors, but did not

6.

provide any support for them after December, 1980.

In March of 1981, Judith's husband was again transferred and the family moved to Louisiana.

Richard testified that he learned of the children's whereabouts in October of 1982, through a friend of Judith's, and that he did not learn their precise address until January of 1983. He testified that he had his first telephone conversation after they left Texas on January 13, 1983, and sent them gifts at Christmas in 1983. There was no further contact between Richard and the children until March 9, 1984, although Richard testified that he had some contact with the district attorney's office "towards the end of 1983" and started to discuss the possibility of securing a warrant in lieu of a writ of habeas corpus. However, no action

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was taken to secure the warrant until he was served in an adoption proceeding in Louisiana.

In January of 1984, Judith and her husband filed a petition in a Louisiana court for the adoption of the minors by Mr. Pope. Richard was served in that action sometime in February of 1984.

On March 9, 1984, at approximately 7:20 a.m., Richard, without notice to Judith, removed the children from a school bus stop in Slidell, Louisiana.

As a result of the removal of the children without use of legal process and without notice to Judith, criminal proceedings were initiated, Richard was charged with kidnapping, and extradition was sought against Richard by the State of Louisiana. (See San Bernardino Superior Court Case No. SCV 224030.)

8.

In explaining his use of self-help, Richard testified as follows:

"Q (BY MR. RICHARDSON) Now, I believe it was in January, you testified that you were served with a petition for a non-consensual [sic] adoption and name change; is that correct?

"A That's correct.

"Q January of '84?

"A That's correct.

"Q And you were at that time contemplating the service of the warrant in lieu of writ of habeas corpus?

"A I had thought about it because I had previous contact with the District Attorney's Office. But upon receipt of the non-consensual [sic] stepparent adoption, petition and name change, it was the very first step that I took to secure my custody of the children.

9.

"Q Now, was it your understanding that if this warrant in lieu of writ were served in Louisiana, that the children would immediately be returned to you in California or that there would be some proceedings?

"A It was my understanding that if I attempted to use the warrant in lieu of writ of habeas corpus in light of a stepparent adoption proceedings pending, that the -- all the issues would end up being litigated in Louisiana, including the validity of the California order."

On April 11, 1984, Judith initiated an order to show cause in the San Bernardino Superior Court to set aside the custody order of February 27, 1981, whereby Richard was awarded sole custody and child support was terminated. It is from the court's reaffirmation of those orders on May 31, 1984 that this appeal has been taken.

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DISCUSSION

Judith raises the following issues on appeal:

(1) Did the California court have jurisdiction over the custody issues?

(2) Assuming jurisdiction, did the trial court abuse its discretion by exercising jurisdiction and removing physical custody from appellant in light of respondent's unclean hands?

(3) Did the trial court abuse its discretion by finding it in the best interests of the children to confirm sole custody in the respondent?

I. Jurisdiction

The Uniform Child Custody Act, Civil Code section 5152,<sup>1</sup> sets forth jurisdictional grounds in child custody

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<sup>1</sup>/All statutory references are to the Civil Code unless otherwise stated.

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matters. The provisions pertinent in this case are as follows:

"(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

"(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or persons acting as parent continues to live in this state.

"(b) It is in the best interest of the child that a court of this state assume

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jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

". . . . .

"(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."

It is clear that California was not the "home state" within the meaning of subdivision (a). "Home state" is defined by the Uniform Child Custody Act, section 5151, as follows:

"(5) 'Home state' means the state in which the child immediately preceding the time involved lived with his parents, a

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parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six-months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period."

In January of 1981, when Richard initiated his first order to show cause for a modification of the custody decree, the children had not resided in the state of California since November 1979. They had been living with their mother and stepfather continuously since they left California and had resided in Texas for more than one year.

Thus, Texas was the home state within the meaning of subdivision (a) at the time Richard's initial request for modification was filed. Furthermore, the jurisdiction of

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the Texas court had already been invoked prior to the filing of his order to show cause for modification.

Nevertheless, the fact that Texas had become the home state did not necessarily oust California of modification jurisdiction.

In Kumar v. Superior Court (1982) 32 Cal.3d 689, the California Supreme Court considered the difference between initial jurisdiction and modification jurisdiction and concluded that under section 5163,<sup>2</sup> the strong presumption is that the decree state will continue to have modification

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<sup>2</sup>/Section 5163 in part provides:

"(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state had jurisdiction."

15.

jurisdiction until it loses all or almost all connection with the child.

Moreover, "'Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside.'" (Kumar v. Superior Court, at p. 696, quoting with approval Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA (1981) 14 Fam. L.W. 203, 214-215.)

In Kumar the Supreme Court found a "significant connection" with the home state of New York although the child had been

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absent for 18 months at the time of the commencement of the California proceeding.

The basis for California modification jurisdiction in this case and the one relied on in the change of custody order, was subdivision (b). In its order of February 27, 1981, modifying custody, the court stated:

"1. That the minor children have sufficient contacts with the State of California to continue to provide a basis, for the Superior Court, State of California, County of San Bernardino, to exercise continuing and concurrent jurisdiction, pursuant to Civil Code section 5152, subdivision (1)(b) as construed together with

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Civil Code section 4600 as amended and 4600.5 as enacted."<sup>3</sup>

The San Bernardino Superior Court in the February 27, 1981, order went on to make the following findings:

"2. That the Petitioner has been frustrated in facilitating the order of this Court, dated October 27, 1980, with respect to the Christmas visit, provided in the

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3/Civil Code sections 4600 and 4600.5 do not assist in the determination of jurisdiction as section 4600.5 specifically provides in subparagraph (j) that: "Any order for the custody of a minor child of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section."

Moreover, the specific provisions of the Uniform Child Custody Act relating to jurisdiction prevail over more general provisions of Civil Code section 4600 and Code of Civil Procedure section 410.50. (In re Marriage of Steiner (1979) 89 Cal.App.3d 363, 371; Smith v. Superior Court (1977) 68 Cal.App.3d 457.

18.

order, as a result of Respondents [sic] refusal to allow any contacts between the Petitioner and said minor children.

"3. That it is not in the best interests of the minor children that the Petitioner be deprived of frequent continuing and meaningful contacts with the minor children. That it is in the best interests of the minor children that sole custody be awarded to the Petitioner subject to the Respondents [sic] right of reasonable visitation."

It is not enough merely to state that it is in the best interest of the children that a California court assume jurisdiction. Section 5152, subdivision 1(b) clearly requires that the finding of best interest be predicated upon the fact that "the child and his parents, or the child and at least one contestant, have a significant connection with

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this state, and . . . there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

After a careful review of the record, we conclude that there is substantial evidence to support the finding of modification jurisdiction.

At the time of the initial hearing, although Judith had had continuous custody of the minor children since the parties' separation on March 9, 1977, when the children were aged 4 years (Jennifer) and 2 years (Jamie), Richard had exercised his right to visitation until Judith removed them from with [sic] the State of California in November of 1979.

Because the children had spent the first several years of their lives in California,

and the father continued to exercise visitation with the children until prevented by Judith's removal of the children, it cannot be said that there was insufficient evidence to support the trial court's finding of a significant connection with the state within the standard established by Kumar.

## II. Unclean Hands

Judith contends that, even if the California superior court had jurisdiction at the time of the modification hearing, it was an abuse of discretion to exercise jurisdiction because of Richard's unclean hands.

The Uniform Child Custody Act, section 5157, provides in pertinent part as follows:

"(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline

to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances.

"(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances." (Emphasis added.)

It is clear that if Richard had made an initial application for custody after the

22.

removal of the children from Louisiana without legal process and without the knowledge of the mother, the court could have declined jurisdiction pursuant to the discretionary provisions of subdivision (1).<sup>4</sup>

However, because the abduction did not occur until after Richard's successful application for modification in the San Bernardino court, the mandatory provisions of subparagraph (2) do not apply. In any event, Judith may not now collaterally attack the February 1981 order on any but jurisdictional grounds.

### III. Abuse of Discretion

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<sup>4</sup>/It is also noteworthy that if Judith had sought to modify the California decree in another Uniform Code state, that state court could have declined jurisdiction pursuant to the discretionary provision of subdivision (2), based upon her removal of the children from California in violation of the custody order.

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The order before this court on appeal is the order of May 31, 1984, "reaffirming" the sole custody in Richard which was granted under the order of February 27, 1981. Therefore, it is the May 1984 order we must consider in the light of appellant's argument that the court abused its discretion in granting Richard physical custody of the children.

. . . . .

While it is certainly sad that the father's efforts at visitation were frustrated to the extent they were, that alone does not provide an adequate factual basis to support an award of sole custody to the father. Absent any showing that it is in the best interest of the children for them to be separated from the mother who has had the responsibility of their care and nurturing for their entire lives, the sole custody

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order in this case can only be viewed as punitive.

We find that it was an abuse of discretion for the trial court to confirm the award of sole custody in this case.

The order awarding custody to Richard is reversed and the matter remanded for further proceedings consistent with the Uniform Child Custody Act.

NOT FOR PUBLICATION.

/s/ MORRIS

P.J.

We concur:

/s/ MC DANIEL

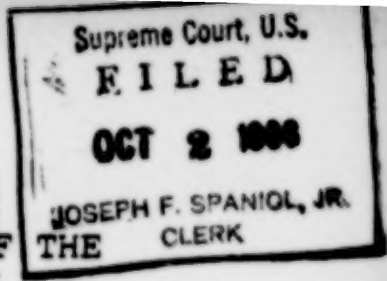
J.

/s/ RICKLES

J.

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NO. 86-381

IN THE SUPREME COURT OF  
UNITED STATES



PEOPLE OF THE STATE OF CALIFORNIA  
Petitioner

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, FOR THE COUNTY OF  
OF SAN BERNARDINO,  
Respondent

RICHARD SMOLIN and GERARD SMOLIN,  
Real Parties In Interest

ON PETITION FOR WRIT OF  
CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF CALIFORNIA

BRIEF OF THE AMICI CURIAE  
STATES OF ALASKA, HAWAII, IDAHO,  
INDIANA, KANSAS, KENTUCKY, LOUISIANA  
MAINE, MONTANA, NEVADA, NEW HAMPSHIRE  
OKLAHOMA, PENNSYLVANIA, PUERTO RICO,  
SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH  
VIRGIN ISLANDS, WYOMING

IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI

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No. 86-381

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IN THE SUPREME COURT OF THE  
UNITED STATES

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PEOPLE OF THE STATE OF CALIFORNIA  
Petitioner

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, FOR THE COUNTY OF  
OF SAN BERNARDINO,  
Respondent

RICHARD SMOLIN and GERARD SMOLIN,  
Real Parties In Interest

---

BRIEF OF AMICI CURIAE  
IN SUPPORT OF PETITIONER

---

INTEREST OF AMICI

The amici curiae are states who have an interest in the just and expeditious execution of the constitutional and statutory provisions for the extradition of fugitives from justice. The resolution of the question presented by this appeal will

significantly affect amici states and their ability to insure the fair, prompt, and efficient exercise of their criminal laws.

The amici submit this brief through their Attorneys General pursuant to Sup. Ct. R. 36.4. This brief is presented in support of the Petitioner People of the State of California.

SUMMARY OF ARGUMENT

The respondent-court and the Supreme Court of California have decided an important issue arising under Article IV, section 2, clause 2 of the United States Constitution in a way which seriously conflicts with this Court's decision in Michigan v. Doran, 439 U.S. 282 (1978), and previous cases interpreting that constitutional provision. It greatly expands the role of the courts of an asylum state in the context of extradition, and it does so by permitting an asylum state court to make an ultimate determination of fact concerning the guilt or innocence of an alleged fugitive. The decisions of the respondent-court and the Supreme Court of California allow a judicial officer in the asylum state to look to extrinsic evidence, outside the extradition documents, to determine whether an alleged fugitive could be

found guilty of the crime charged in the demanding state. By so ruling, the respondent-court and the Supreme Court of California have usurped for the Judiciary a role that does not properly belong to it in extradition.

The decisions of the respondent-court and the Supreme Court of California will create a dangerous precedent if allowed to stand. The decisions below undermine and frustrate the important concepts of comity and full faith and credit articulated in the Extradition Clause and create the danger of "balkanizing" the administration of justice among the several states, the very evil which the Extradition Clause was designed to prevent.

The decision of the Supreme Court of California should be reversed because the rulings made by the courts below can only be properly made in the courts of the State of Louisiana.

REASONS FOR GRANTING THE WRIT

- I. THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN DIRECT CONFLICT WITH THIS COURT'S RULING IN MICHIGAN V. DORAN, 439 U.S. 282 (1978).

In Michigan v. Doran, 439 U.S. 282 (1978), this Court analyzed the fundamental purposes underlying the Extradition Clause. This Court stated:

The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states. It articulated, in mandatory language, the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV. The Extradition Clause, like the Commerce Clause, served important national objectives of a newly developing country striving to foster national unity. In the

administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes, without impinging on essential state autonomy.

Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the constitution. The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.

439 U.S. at 287-88, citing Biddinger v. Comm'r. of Police, 245 U.S. 128, 132-133, 38 S.Ct. 41, 42, 62 L.Ed. 193 (1917); Appleyard v. Massachusetts, 203 U.S. 222, 227, 27 S.Ct. 122, 123, 51 L.Ed. 161 (1906); In re Strauss, 197 U.S. 324, 332, 25 S.Ct. 535, 537, 49 L.Ed. 774 (1905).

Having recognized that interstate extradition is designed to be a summary and mandatory executive process, this Court in Michigan v. Doran clearly and explicitly

identified the four issues which a court in an asylum state could consider upon a challenge to extradition. The Court stated:

A Governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Once the Governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.

439 U.S. at 289, citing Bassing v. Cady,  
208 U.S. 386, 392, 28 S.Ct. 392, 393, 52  
L.Ed. 540 (1908).

With respect to the petition in the instant case, the only issue is whether the fugitives have been charged with a crime in

Louisiana. That issue "is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus." Roberts v. Reilly, 116 U.S. 80, 95 (1885). The issue is not whether the fugitives can be found guilty of the crime charged, but only whether, under the law of the demanding state, they have been charged with an offense.

In this particular case, § 14:45(4) of the Louisiana Revised Statutes prohibits the "intentional taking . . . and removing from the state, by any parent of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the

child." The fugitives were, in fact, charged with this offense, and their extradition was sought on that basis. The respondent-court, as well as the Supreme Court of California, took judicial notice of a California custody decree issued out of the San Bernardino Superior Court, which granted custody of the children to their father, Richard Smolin. Having taken judicial notice of that custody order, the respondent-court held that the State of Louisiana court had failed to demonstrate that it had "any rights with respect to the extradition of defendant." People v. Superior Court, 41 Cal.3d at 764. Accordingly, the respondent-court granted the writ of habeas corpus and discharged the fugitives. On appeal, the Supreme Court of California recognized that although the

ruling of the respondent-court was ambiguous, it in fact had ruled that the fugitives had not been charged with a crime in the State of Louisiana because, on the basis of the California custody order, the defendants could not be found guilty of kidnapping under § 14:45(4) of the Louisiana Revised Statutes. The California Supreme Court then upheld that ruling on the purported ground that the defendants had not been substantially charged with a crime under the law of Louisiana.

The amici states agree with the State of California that the decision by the respondent-court and the California Supreme Court confuses the issue of whether the fugitives were charged with a crime under Louisiana law, with the question of whether they are innocent of those charges. It may be that the fugitives have

a strong and legitimate defense to the charges against them. That defense, however, cannot be litigated in the courts of California, but must be litigated, and can only be litigated in the courts of Louisiana. On the face of the documents submitted by the Governor of Louisiana upon the Governor of California, the fugitives were charged with a crime under the laws of the demanding state. Whether there is extrinsic evidence which might prove them innocent of those charges is irrelevant for purposes of extradition. The only issue which the respondent-court should have considered is whether the fugitives were charged with a crime under the laws of Louisiana, not whether they could be found guilty of those crimes when all the evidence is considered.

The decision of the respondent-court, as well as the Supreme Court of California on appeal, conflicts directly with this Court's decision in Michigan v. Doran, supra, which limited the role of an asylum state court in reviewing extradition. This Court in Michigan v. Doran and in earlier cases emphasized that the process of extradition "is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt." Michigan v. Doran, 439 U.S. at 288, quoting In re Strauss, 197 U.S. 324, 332-333 (1905). See also Drew v. Thaw, 235 U.S. 432, 439-40 (1914). In this particular case, the respondent-court, as well as the Supreme Court of California, abandoned its limited role and looked to extrinsic evidence to determine whether the fugitives

could be found guilty of the crimes with which they were charged in Louisiana, rather than determining simply that they had been charged with a crime under the law of Louisiana. In doing so, they exceeded their authority and intruded upon the legitimate right of the State of Louisiana to determine the guilt or innocence of the fugitives. Additionally, they intruded upon the authority of the executive branch of state government, which has been granted the constitutional authority and responsibility in the area of interstate extradition.

II. THE DECISION OF THE CALIFORNIA SUPREME COURT, IF ALLOWED TO STAND, MAY ADVERSELY AFFECT THE RECIPROCAL PROCESS OF EXTRADITION CONTEMPLATED BY ARTICLE IV, SECTION 2, CLAUSE 2 OF THE UNITED STATES CONSTITUTION.

It follows from what has already been said that the amici states believe that the decisions of the respondent-court and the Supreme Court of California below establish a dangerous precedent in the area of extradition law. The very concept of interstate extradition, as recognized by the fact that virtually every state in the Union has adopted the Uniform Criminal Extradition Act, is that extradition is designed to be a reciprocal, mutually cooperative and uniform process between the states. The ruling of the respondent-court, as upheld by the highest court of California, creates a dangerous situation by allowing the courts of an asylum state

to consider extrinsic evidence to determine whether a fugitive can be found guilty under the law of the demanding state in the guise of determining whether the fugitive is charged with a crime in that state.

Such a result creates the very evil which the Extradition Clause was designed to eliminate, namely, it would permit a state from becoming a sanctuary for fugitives from justice and would "balkanize" the administration of criminal justice among the several states. Michigan v. Doran, supra at 287-88. It undermines the very concepts of comity and full faith and credit and generates lack of respect that an asylum state must show to the judicial system of its sister state.

The fact that the decisions below come from the State of California is another significant reason for concern. As the

petitioner has pointed out, California is the nation's largest state and receives more extradition requests than any other. The potential impact of the decisions below, if allowed to stand, could be significant.

As this Court has stated, interstate extradition was intended to be both summary and mandatory. The decision below undermines both of those salutary purposes of extradition by injecting into the process the consideration of extrinsic evidence by a court which has absolutely no jurisdiction over the crimes charged. In essence, these rulings permit the very type of plenary review in the asylum state of issues which should be fully litigated in the demanding state, and thereby "defeat the plain purposes of the summary and

mandatory procedures authorized by Art. IV, § 2." Michigan v. Doran, supra at 290; Pacileo v. Walker, 449 U.S. 86, 88, 101 S.Ct. 308, 309, 66 L.Ed.2d 304 (1980), reh. denied, 450 U.S. 960 (1981).

The fugitives in this case have a right to a trial to determine their guilt or innocence of the crimes with which they stand charged in Louisiana. The State of Louisiana likewise has the right to have the guilt or innocence of the fugitives determined. Under the Extradition Clause of the United States Constitution, that determination must be made in the State of Louisiana. The trial courts of California have no role to play in making that determination, and it was error for the respondent-court to consider extrinsic evidence to determine that the fugitives could not be found guilty of the offenses

with which they now stand charged in Louisiana. That ruling, as upheld by the California Supreme Court, should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted, and upon review, amici states respectfully request that the judgment of the California Supreme Court be reversed.

Respectfully submitted,

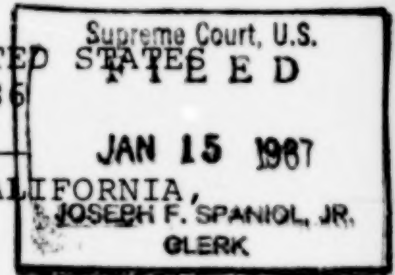
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**COPY**

In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1986



PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, FOR THE COUNTY OF  
SAN BERNARDINO,

Respondent,

RICHARD SMOLIN AND GERARD SMOLIN,

Real Parties in Interest.

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF  
CALIFORNIA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED September 2, 1986  
CERTIORARI GRANTED December 1, 1986

10308

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR  
HARD COPY AT THE TIME OF FILMING.  
IF AND WHEN A BETTER COPY CAN BE  
OBTAINED, A NEW FICHE WILL BE  
ISSUED.

Relevant Docket Entries

August 13, 1984 - Real parties in interest filed separate petitions for habeas corpus relief in San Bernardino County Superior Court (Case No. SCV 224030)

August 24, 1984 - Hearing in superior court on order to show cause. Petitions granted; real parties in interest ordered discharged. (See Jt. App., pp. 3-54, infra.)

September 17, 1984 - People filed petition for writ of mandate in California Court of Appeal, Fourth Appellate District (Case No. E001358)

March 26, 1985 - California Court of Appeal, Fourth Appellate District, District Two, filed its opinion reversing respondent superior court. (See Pet. App. B.)

May 3, 1985 - Real parties filed petition for review in California Supreme Court

May 23, 1985 - California Supreme Court granted review (Case No. LA 32068)

October 8, 1985 - Oral argument in California Supreme Court

May 1, 1986 - California Supreme Court  
filed its opinion reversing  
court of appeal and upholding  
respondent superior court's  
order discharging real  
parties in interest (Pet.  
App. A)

June 5, 1986 - People's petition for  
rehearing denied.

SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
FOR THE COUNTY OF  
SAN BERNARDINO

DEPARTMENT NO. 1  
HON. WILLIAM PITT HYDE,  
JUDGE

In re GERARD J. SMOLIN ) SCV-224030  
and RICHARD SMOLIN )  
on Habeas Corpus, )  
Petitioners )  

---

REPORTER'S TRANSCRIPT ON  
ORAL PROCEEDINGS

Friday, August 24, 1984

APPEARANCES:

For the  
Respondents: DENNIS KOTTMEIER  
District Attorney  
By: JOSEPH A. BURNS,  
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REPORTED BY:

EVA LORENE PALMER,  
C.S.R.  
Official Reporter,  
C-4669

SAN BERNARDINO, CALIFORNIA; FRIDAY,  
AUGUST 24, 1984, 2:14 P.M. DEPARTMENT  
NO. 1 HON. WILLIAM PITT HYDE, JUDGE

APPEARANCES:

The Petitioner, Richard  
Smolin, present with and  
by counsel, ALBERT H.  
MALDONADO, Attorney at  
Law; the Petitioner,  
Gerard J. Smolin, with  
and by counsel, LARRY F.  
ROBERTS, Attorney at  
Law; the Respondents  
represented by JOSEPH A.  
BURNS, Deputy District  
Attorney.

(Eva Lorene Palmer,  
C.S.R., Official  
Reporter, Lic. No.

C-4669)

THE COURT: Gerard Smolin.

MR. ROBERTS: Good afternoon, your Honor, Larry Roberts appearing on behalf of Mr. Smolin. He is present. We are ready. I believe he is out in the hall.

MR. BURNS: Deputy District Attorney Joseph Burns appearing for Respondent, your Honor.

THE COURT: This is with regard to both Richard and Gerard, isn't that right?

MR. MALDONADO: Yes, your Honor. Albert Maldonado for the Petitioner Richard Smolin.

THE COURT: All right. And the parties are present, you are saying?

MR. MALDONADO: Yes, Mr. Richard Smolin is present, your Honor.

MR. ROBERTS: Yes, and Gerard is present.

THE COURT: Gerard Smolin is present?

MR. ROBERTS: Yes, he is, your Honor.

THE COURT: The Court has just now received the return to the order to show cause. And, basically, the documents in the file, now in the files, I should say, really do amount to essentially an order to show cause for hearing at this time. And that is in the file 224030, which

is the principal file, I do believe. The documents were also filed in FL30380 which was and is the family law file.

I noted Mr. Burns' concern about some of the -- as he indicated, things had gotten off on the wrong foot, with regard to the filing and designation of documents in the file in which they were placed. And I think maybe there is some merit to that. But, as I understand it, what we are really concerned about here, and the bottom line is this issuance of a writ at this time to, in effect, prevent the extradition process from proceeding. And that basically would be in 224030.

Does anybody really have any quarrel about that?

MR. MALDONADO: I have no quarrel with that issue, your Honor.

THE COURT: I think the family law file is a matter of some interest and relevance to these proceedings, because I think again where we go is the -- again, consideration of whether or not the family law proceedings up to this point have some bearing on the Louisiana proceedings and, I guess, more specifically, whether they have some bearing on the Court's determination as to whether or not the initiation of the Louisiana proceedings in the first instance was done under any color of right. And I think Mr. Burns will want to address that.

One other point, probably we should cover at this juncture, and that is that question of whether this Court should consider this matter, having been involved in the family law

proceedings. Mr. Burns raises the point, and I think appropriately so, that we do have a habeas corpus department in this court, we do have, generally speaking, our habeas corpus proceedings proceed in that department. When the initial papers were presented to me and there was a question in my mind as to whether I should put it in this department or in Department 14, I concluded that it might be more cost effective, from a time standpoint, to put it in this department, because I at least was familiar with all of the proceedings that had taken place up to this time. I felt that with Judge Cranmer's writ calendar being what it is, that he has some limited time to devote to a large number of writ cases, and that for him not to have to go back and digest through this, it just seemed

to me it was more time cost efficient to put it in here. But if anyone wants to file an affidavit against this court, it wouldn't hurt my feelings. Otherwise, we can proceed with it.

Okay. This is an order to show cause brought on behalf of Gerard and Richard Smolin, and the prosecution having filed its return, I think at this juncture we can proceed in normal course of affairs. Who would like to go first?

MR. MALDONADO: I would, your Honor, since we have the burden.


THE COURT: Yes.

MR. MALDONADO: Your Honor, I can perceive the District Attorney, with all due respect, making arguments that somewhere along the line I'm going to be arguing family law, the Parental Kidnapping Prevention Act and the

Uniform Child Custody Act, and that they have no relevance or basis in this proceeding because it is simply to determine whether or not the extradition warrant is valid on its face, in which there are four areas. I accept Mr. Burns' challenge that this is a criminal proceeding, it is a constitutional proceeding, and that we should, at the outset, direct ourselves to those four issues.

There is no question that my client, Richard Smolin, is the correct party in this matter. We have no quarrel with the identification.

We go to the second issue, and really the bottom line, as to whether or not the paperwork, the affidavit, the charges, the criminal documents from St. Tammany Parish in Louisiana are proper on their face.



And there is significant California law in 1891, a case called Spears, S-P-E-A-R-S, it is still authority, it is still the law of this State, it is a Supreme Court decision. Mr. Burns attempts to distinguish this case and he does mention it in his points and authorities. But this is a significant case, because the bottom line is that if a person in another state can say, "I believe a woman or man has committed a crime, I may not have seen it, but upon information and belief I think, I believe, I have been informed, this person should be arrested." Then the liberty and the freedom of California citizens can be taken away simply on the statement by a citizen of another state eight hundred miles away in the State of Louisiana.

The State of Louisiana, in its documents that they filed and in their statements that they have issued all along is that "Why do you want to challenge Louisiana laws? We have respect due to our laws as well as your State in California and Texas." The problem is that the affidavit of Judith Pope, the mother of the children, is abundant, it is pregnant with information and belief in which she, herself, does not have personal knowledge and in other instances in which she, herself, has conducted herself in a fraudulent and a perjurious manner. I know the D.A. is going to say that has nothing to do with that, go argue that in Louisiana, bring that as an affirmative defense in Louisiana and let some Louisiana lawyer in a criminal trial raise that as a

defense. The California Supreme Court, your Honor, in this In re Spears case said, you have the right, you have the obligation, and you have the authority to test that affidavit of Judith Pope today.

I am going to take her affidavit line by line and indicate to the Court why I believe Richard Smolin should not be sent back on the basis of her affidavit. She states that, "The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmie Huessler of 2015 Bridle, Slidell, Louisiana." We don't have Jimmie Huessler's affidavit here, we don't have Mason Galatas' here, we don't have Cheryl Galatas' affidavit here. We have

hearsay upon hearsay that she believes that her children were kidnapped because it was told to her by three other people. The State of Louisiana has failed to make their paperwork valid on its face.

Looking at the context of the affidavit in her first sentence, she says, "On March 9, 1984, at approximately 7:20 a.m., Richard and Gerard Smolin kidnapped Jennifer Smolin, age ten, and James C. Smolin, age nine, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana." You would think she was at the bus stop, you would think she was present and she was a percipient witness. And, yet, this is contradictory to her sentence where she was told by three other people.

In re Spears does not say that a judge has a perfunctory duty simply to look at Governor Deukmejian's extradition arrest, it does not simply say that you look at Governor Edwin Edwards extradition papers perfunctory and just move them along like some rubber stamp, just process it as a clerk. It goes far beyond that, your Honor.

In In re Spears, the alleged fugitive in that case was not substantially charged with the crime of embezzlement. And the Supreme Court of the State of California said that whether or not a fugitive is so substantially charged with a crime is a question of law. It is a question of law, it is not a question of fact. It is a question of law, which is always open.

The statement of a fact is what makes an affidavit. We have here statements that are not factual. We have statements that are fatally defective. And charges, as the Supreme Court says, are not verified by an affidavit that somebody is informed and believes that they are true. She is saying, "I believe and I am being told that my children were kidnapped." And then in her last sentence she says, "They were without authority to remove the children from the affiant's custody." And she says it is based on a Texas court order dated February 13, 1981. She is not lying there, but she is also not telling the truth.

There were other court orders in California -- and this is where I am getting into the custody and the family law realm of it. There were



other California orders existing at the same time. And for the Court to ignore and to not look at those valid California orders that were issued by Judges Campbell, by yourself, by Commissioner Kraig Zappia is to defy the realities of this case.

Mr. Smolin, on October 20th, 1980, secured a valid California order giving him joint custody. On October 27th, 1980, Mrs. Smolin-Pope got an order in Texas saying she had full custody.

Under the Parental Kidnapping Prevention Act, which is a federal law cited at 28 US Code 1738, subsection A, subsection (g), the law provides that the Court shall not exercise jurisdiction in any proceeding for custody determination commenced during the pendency of a proceeding in a court of another state where such court of

that other state is exercising jurisdiction consistently with the provisions of this section. I misquoted myself, your Honor, that is subsection (g).

If, for the moment, we accept the argument that California had a pending proceeding on October 20th, 1980, and if we accept that Texas initiated its order on October 27th, 1980, then Texas was without authority legally to issue a full custody, full faith and credit modification. In turn, the State of Louisiana said, "Look, the State of Texas is a sister state like California, it is going on and honoring a California order. Therefore, we are going to honor the Texas order and make it our own and she can go ahead and adopt these children out."

The problem with the affidavit of Judith Pope is that, not only is it factually defective, but she fails to tell the truth, she fails to reveal all that is necessary. In effect, you have Louisiana authorities that are going on the misinformation and disinformation of an affiant who has submitted herself to the jurisdiction of this Court many times before the kidnapping charges were issued and after the kidnapping charges were issued, and she has the gall to say that she had full custody, when this Court knows, by its own valid orders, that she did not have full custody, she had joint custody and later she had no custody.

The California Supreme Court in Spears said, "The liberty of a citizen cannot be violated upon the

mere expression of an opinion under oath that he is guilty of a crime." She is giving an opinion that she had valid custody orders, it is the opinion of herself. The opinion can be challenged by the jurisdictional proceedings of Texas and of California.

The District Attorney indicates in his return, your Honor, that, at least, I am attempting to battle the Information, that it does not correctly charge a crime. I take issue with that. The Executive Department says that he is charged with the crime of simple kidnapping from Louisiana. The Assistant District Attorney Margaret A. Coon, C-O-O-N, and William A. Alford, Jr. have issued Informations that my client is guilty of simple kidnapping. There is a subsection to Louisiana law that if a

parent does not have valid custody and goes into another state or goes into the area where the parent has custody and takes those children, he or she is guilty of a crime in this instance.

Now, I am quoting Louisiana law in my memorandum of points and authorities. Louisiana is an enlightened state, it has had these issues before. I don't think it is arguing the merits of this case, I think it is arguing the law.

Her affidavit is replete with inconsistencies and incorrections. But my client, when he went to Louisiana on March 9, 1984, had valid custody orders. She knew that they were valid custody orders. She was served personally to appear in California and he had every right as a father, every right as a father to see and to remove his children to this State. You cannot

commit a crime, you cannot do wrong by taking that which is legally your own. Mr. Burns may disagree and say that it is a fine argument to raise in defense trial for affirmative defense. But it goes to the issue of Mrs. Pope saying, "I had valid custody orders at the time that my children were taken." I would ask the Court to keep in mind that the issues of extradition, whether or not my client is a fugitive from justice, whether or not my client is substantially charged with the crime, and whether or not the papers are on their face accurate, must be taken into light of this writ of habeas corpus hearing. But I ask the Court not to divorce itself from the realities of the family law proceedings which clearly establish legal right for my

client to have and to hold his children. Thank you.

THE COURT: Thank you, Mr. Maldonado. Mr. Roberts?

MR. ROBERTS: Thank you, your Honor, I have prepared a considerable exposition of arguments that I am presenting to the Court in reading my points and authorities, but many of the points that I was going to develop, Mr. Maldonado touched on them. So I will try to make myself a little briefer than the notes that I have.

First, and preliminarily, before I go further, I ask this Court to take judicial notice of the file in In re Marriage of Smolin, which is numbered Family Law 30380, I believe the Court has it before it now. Particularly, in my file, those orders and documents which are attached to the

habeas corpus petition filed by Gerard Smolin.

I also join in the moving arguments Mr. Maldonado has made, to the extent he has made them.

The People, in filing their have return, I think, done a fine job of setting forth the nature of the extradition law and the elements that are necessary and appropriate for the Court to review and those elements which are necessary and inappropriate for the Court to review. But, I wish to express that this case is -- this extradition case cannot be taken in a vacuum. There is more here than merely whether the charges or the affidavit -- the charges, the forms and so forth set forth a crime. It is not -- there is more here than this stack of papers. There is a lot of what is in that

domestic relations file and it all relates in one way or another to Mr. Gerard Smolin and whether or not he committed a crime in Louisiana.

Of the four tests that this Court can appropriately apply in determining whether Mr. Smolin should be extradited, probably the one most significant in this case is whether or not a crime has been charged. The crime charged by the Information is that he, Gerard Smolin, committed simple kidnapping by taking the children, one in each count, from their mother who had custody. And that allegation is supported by mother's affidavit. Mr. Maldonado has spoken to the nature of that affidavit. I believe him accurate in everything that he says, although I think he is being generous. Mrs. Pope does more than

simply not tell the truth, Mrs. Pope deceives in that affidavit. I believe that she commits perjury. And I stress that on the Court. And I think that she does it on its face, knowing that if she doesn't do that, a crime is not going to be charged and she is not going to be able to achieve the end which she is after, that is, the return of the children. But the real question then is whether that is a defense to the charge of simple kidnapping or whether the affidavit and charges are defective on their face.

If the affidavit is perjurious or if the affidavit does not tell the complete truth on its face, I have to wonder where the probable cause is to charge in the first place. And if the authorities who issued the complaint and Information know that the

statements contained therein are untrue or subsequently find out they are untrue or should have known they are untrue, where is the probable cause for the charging of the crime? I think that those elements are more than a mere defense to the crime, those elements go directly to whether or not a crime is substantially charged.

Curiously, reviewing the affidavit signed by Judy Pope, reviewing the affidavit signed by Mrs. Coon, and reviewing the Information filed by the District Attorney in St. Tammany Parish, nowhere is there an allegation that the taking of these children was for an unlawful purpose, no place in any of those documents. And, further, there is absolutely no indication that the taking by Mr. Gerard Smolin was to

obstruct or to otherwise frustrate a pending Louisiana court proceeding, not mentioned in any of those pleadings.

It is obvious, from the face of the documents, that Mrs. Pope did not have custody. Let me rephrase that. Well, it is not obvious from the face of the documents that Mrs. Pope has custody. Taking judicial notice of the family law file in conjunction with the documents, it is obvious that she did not have custody of the children and it is obvious that she knew she didn't have custody of the children, and it is, therefore, obvious that she made a misstatement or perjured herself.

I have to ask the question, since the affidavits and Information refer to a Texas full faith and credit decree and judgment, I have to ask the

question whether, because Texas takes jurisdiction over these children, California's jurisdiction is thereby divested. And, in reviewing that issue, I find that it is not. In fact, all Texas' judgment really does is reinforce California's judgment. Subsequent California modifications, particularly those which Mrs. Pope and the District Attorney in St. Tammany Parish become aware of, are not ignorable. As authority for those positions, I cite 28 United States Code Section 1738, large Paragraph A, small paragraph (a).

And if Mr. Smolin is not being substantially charged with a crime -- Mr. Gerard Smolin has not been substantially charged with a crime, than Mr. Smolin is not a fugitive from justice. Because, in order to be a

fugitive from justice, one must have committed a crime in another state. What we have here is an exemplar citizen of this state before this Court sought to be extradited to another state, a foreign state with a foreign jurisdiction, for committing an act which is alleged to be a crime by an allegation from a complainant which is perjurious, or, at very least, is not based upon divulging of the full truth. The act committed by Mr. Smolin is not, in fact, criminal.

On behalf of Mr. Smolin, I request this Court to grant the petition and deny the extradition. Thank you, your Honor.

THE COURT: Okay, thank you. Mr. Burns.

MR. BURNS: Thank you, your Honor.

Your Honor, in the return which I have prepared and filed this date with the Court, I have addressed, to my satisfaction, each of the arguments counsel have advanced here in court today and I think I can do no better. Certainly, I could not respond to them more concisely than I have done in my papers, so I do not intend to go into great lengths on all the points they have been discussing here.

They can legitimately in this very special proceeding challenge the sufficiency of the papers which support the extradition. And about the best they have been able to do in that respect is to cite the In re Spears case, challenging that Judith Pope, Richard's ex-wife's affidavit in Louisiana is defective because it is based on information and belief. And

Spears does talk about that and does say that.

What Mr. Maldonado did not talk about, however, was that California Supreme Court decision of In re Cooper, which sets up a standard which we do comply with in this case. And that is, a standard which involves the setting forth of sources of information and reasons for belief within the affidavit in question. That was done in Cooper. The facts in Cooper, too, are more like ours. In that, unlike the Spears decision where only the affidavit was involved in the extradition process, the Spears extradition process, as I understand that case, involved only an affidavit, and the whole thing turned on that. And the Court there said that the affidavit was based solely on

information and belief and, therefore, failed, was invalid. We have a different situation here. We have a different kind of affidavit wherein Mrs. Pope recites the sources of her information and the reasons for her belief. That sets this case apart from Spears and puts it in Cooper, I say, but we also have an Information. And the Information I think cannot more substantially charge an offense than does the Louisiana Information in this case. It states plainly that both Gerard and Richard Smolin kidnapped the two children. I do not see how a pleading and accusation of a crime could be more substantially made.

I have, again, in my papers, quoted from Cooper. And I think it may be appropriate to end my comments here with that quotation. I am quoting from

Cooper, which quotes from an earlier decision.

"When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective States concerned as a sufficient basis, in law, for their acting -- the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive -- the judiciary should not interfere, on habeas corpus, and discharge the accused, upon technical ground, and unless it be clear that what was done was in plain contravention of law."

It is obvious that we are dealing with an extradition process in which both the Louisiana authorities and the California authorities have concluded that the paperwork is sufficient. And my return, I hope, will show the Court that indeed that is the case under the law. And I submit that there are no defects shown by Petitioners in this extradition

process, and that it must be allowed to proceed. Thank you.

THE COURT: Let me ask you a question, Mr. Burns, with regard to that.

Do you perceive that the same ruling would necessarily follow for both parties in this case? In other words, if a writ were granted for Richard, it would, ipso facto, have to be granted as far as Gerard? I would think so, but I really don't know and I don't know if anybody has really considered that. They obviously acted -- whatever was done was done in concert between the two of them.

MR. BURNS: That is my understanding of the facts, but I don't know if we have to go that far. The charge in Louisiana is against both of them and I think the Information

alone is sufficient to make this process go through.

THE COURT: Didn't we also have a transcript of the family law, of the ruling of the Court?

MR. MALDONADO: Yes, your Honor, I have a copy.

THE COURT: Could I look at that? I don't know where my original is.

Do you have any objection, Mr. Burns, I am sure he has marked it up and --

MR. MALDONADO: I will take off the paperclips.

MR. BURNS: I have no objection to the Court's looking at it. I do object to its being considered in this process.

THE COURT: Okay, I need to look at it to find out, number one,

whether I can or should take notice of a ruling -- if in fact the Court in the prior proceeding did make a finding based upon testimony of all the parties, including Mr. Smolin and Mrs. Smolin, that she, in all her conduct, was acting improperly or fraudulently or in complete disregard of Mr. Smolin's parental rights, then in addressing the question now before us as to the sufficiency of the paperwork that goes into a criminal charge in Louisiana, doesn't that finding really have something to do with this habeas corpus proceeding?

MR. BURNS: I don't know how the inquiry fits within any of the four grounds that can be raised in this proceeding, your Honor.

THE COURT: Because if she makes an affidavit saying that, "I have

full custody of these children, these children were taken from my custody, and they were taken wrongfully." And she knows that is not true, and this Court has, in essence, made a finding that that is not true, that she, if you want to put it in common terms, lied when she said that, then doesn't that finding, no matter where it appears, in the family law file or this file, or anywhere else, come into play?

MR. BURNS: I believe that that kind of inquiry necessarily goes beyond the face of the affidavit. And the inquiry to which this Court is restricted is on the face of the papers, that is the grounds which Petitioners have raised, and you cannot look at the face of the affidavit and follow the line of argument which counsel have advanced, your Honor is

now discussing. In order to invalidate the affidavit, in order to find that she was lying, you have to go beyond that. I think that is improper.

THE COURT: Why? In general, aren't the affidavits brought to the judge or the magistrate and the judge look at that document and there it is, it is there in black and white, and the judge has no way of testing it or knowing anything to the contrary. But if in fact, when this affidavit is brought to the judge, whether it is a Louisiana judge or Texas judge or California judge, and the judge looks at that affidavit and says, "That is wrong, it is total fabrication, I know, I was there." Is there some obligation for the court to then proceed and, because it says it is packaged nicely

and says the right words, to go ahead and act on that affidavit?

MR. BURNS: Well, I don't think your Honor is acting on the affidavit at all. I think --

THE COURT: I am if I uphold the extradition proceeding.

MR. BURNS: I perceive it differently, your Honor. What you are acting upon here is the challenge against the paperwork, which the Petitioners have brought. You are being asked to invalidate a process which is in motion and which has been cleared by the executive authorities of two different states as being proper under the law that applies to it. To go beyond that affidavit and to say that you believe that the statements made within it are false, based upon proceedings had before you, I think is

to exceed your jurisdiction in this matter.

THE COURT: You know, that is what -- that does concern me. And I suppose that is the danger of having a judge who has sat on one aspect of the case suddenly get into another, but I think that again, as I reflect upon it, I don't think it is certainly improper, because I think that if this went to our habeas corpus judge, or any other judge in this court, that particular judge would, in evaluation of the whole proceeding, have to do exactly the same thing that I am doing now, ask the question, "Is it proper to go back and consider a finding that, in essence, was made in a California file in our proceeding where those people were here in live flesh and blood and testified and findings were made."

MR. BURNS: There are two thoughts I have on that. One is that at the bottom of the line of thinking lies the proposition that the Petitioners are not guilty of the Louisiana charge. And I think everybody in the courtroom knows that that cannot be inquired into in this proceeding. And that is really what that line goes to.

THE COURT: Well, obviously, if I find the affidavit is false, then maybe I am at the same time saying, yeah, that Louisiana kidnapping charge doesn't sound too hot to me. But you are right in principle, certainly I should not be judging Louisiana's sufficiency of proof that they might have in the case or judge that case for them.

MR. BURNS: I have invited the Court in my papers to consider how this proceeding would be undertaken in a court in another jurisdiction besides California, should the Petitioners have been apprehended, let us say, in Arizona. And I think the Court there would properly, if invited to inquire in the relative merits of a custody dispute, say "That is nothing I can decide. The papers are, on their face, in order under the law, and the Petitioners must be delivered to Louisiana authorities." And I think that is exactly the position this Court has to take. The family law matters before your Honor notwithstanding.

THE COURT: Well, maybe it would be a little different if they were in Arizona and Arizona was conducting an extradition proceeding

and Arizona saying, "Okay, we are going to look at it within the framework of what our Arizona process is when an extradition is issued out of Louisiana and the Arizona Governor said it's fine, and so we don't need to worry about what's going on in California." But we are not dealing with that. We are dealing with California here and now, and this is the very forum which this whole scenario initiated, and it arose out of a California relationship, California marriage, California divorce, ongoing custody fight, various orders have been signed, and so I think that maybe we do have some responsibility of looking more -- I suppose, more with a critical eye at the documentation that comes out of another State and, in effect, will operate to countermand our

jurisdiction, our valid orders with regard to custody and possession of children and visitation, and the whole thing.

MR. BURNS: Well, I think your Honor -- pardon me, I think your Honor has to admit that those concepts and concerns go beyond the four grounds which can be raised and considered in this particular proceeding.

THE COURT: It is hard to say when you cross over the line.

Well, Mr. Maldonado, do you wish to respond?

MR. MALDONADO: No, your Honor, I will submit it.

THE COURT: Well, I would only -- I will take judicial notice of the California family law file, and, as part and parcel of that, I would note that the Court in the consideration of

that case indicated at the conclusion of that hearing that:

"The Court would further find that his attempts--" referring to Mr. Pope excuse me, referring to Mr. Richard Smolin, "That his attempts at this --" to exercise visitation "were frustrated by direct and deliberate acts on the part of Mrs. Pope, and those acts were taken with full acquiescence at least, and perhaps under the direction or dominance exercised over her by Mr. Pope.

"I don't think it is any secret in an evaluation of the testimony of the witnesses in this case that Mr. Pope has exercised a dominant aura of influence in this family structure. He has exercised that aura of influence and domination over at

least the children and probably to some extent over Mrs. Pope.

"The history of the transfers to Oregon, to Texas, to Louisiana all would indicate that his role was not one of a husband acquiescing in the expressed or dominant desires of the wife, but were probably at least in concert with hers. And that he has little if any regard for Mr. Smolin; he has little if any regard for the right of Mr. Smolin to exercise parental guidance and control and sharing and control and custody of his children. And he was an active participant in what the Court has concluded and does conclude was a deliberate and longstanding effort to deprive him of his parental rights.

"Mrs. Pope, from the standpoint of evaluation of witnesses

and credibility and testimony, appeared to the Court to be an extremely bright and intelligent woman. She obviously would have to be. She could not maintain the lifestyle and degree of personal development that she has had if she did not have that innate intelligence. So she cannot plead ignorance.

"And the Court had great difficulty in accepting her testimony that when these children would make inquiry, 'Why doesn't dad call us? Why doesn't dad write us?' that her only response was, 'I don't know.' No one of any limited degree of intelligence could fail to recognize that in those questions to her by the children, there was an inherent plea on the part of the children to let us have contact with

dad, let us -- let us establish a relationship.

"And yet she failed to do that. She failed to do it for whatever reason she had, either vindictiveness against Mr. Smolin or fear that he would somehow achieve a right of relationship which would deprive her somehow of her -- her custody and control of these children.

"The adoption process in Louisiana I can only describe as being verging on the fraudulent. There is -- to go to the agencies and represent that the father has failed to support and failed to communicate would indicate to some government agency handling a case on the routine that they do, probably that phrased that way, it meant that dad had no interest in supporting and dad had no interest

in establishing communications. And yet the history of this case shows that that interest was always there."

The Court would conclude that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an interest of the State of Louisiana.

The Court would grant the writ of habeas corpus and order the discharge of Mr. Gerard Smolin and Richard Smolin.

(The proceedings were concluded at this time.)

/ / /

SUPERIOR COURT OF THE STATE  
OF CALIFORNIA FOR THE COUNTY OF

SAN BERNARDINO

DEPARTMENT NO. 1      HON. WILLIAM PITT  
HYDE, JUDGE

In re GERARD J. SMOLIN      )      SCV-224030  
and RICHARD SMOLIN      )  
on Habeas Corpus      )      REPORTER'S  
                                 )      CERTIFICATE  
                                 )  
                                 )  
                                 )

STATE OF CALIFORNIA      )  
                                 )      ss  
COUNTY OF SAN BERNARDINO )

I, EVA LORENE PALMER,  
Official Reporter of the Superior Court  
of the State of California, for the  
County of San Bernardino, do hereby  
certify that the foregoing pages 1  
through 25 comprise a full, true and  
correct transcript of the proceedings  
held in the above-entitled matter on  
August 24, 1984.

-54-

Dated this 30 day

August, 1984.

C.S.R.

Official Reporter, C-4669

SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
FOR THE COUNTY  
OF SAN BERNARDINO

ACIS CASE NO.:C 0156942  
CASE NO.:SCV 224030

JUDGE:WILLIAM PITT HYDE

DATE: TIME:

08/24/84 01 30 PM

DEPT:01

CLERK:JENNIFER DEARDOFF

LARRY F. ROBERTS

JOSEPH BURNS, DDA

BALIFF: ANTHONY JAIME

REPORTER: EVA PALMER

CASE TITLE: IN THE MATTER OF  
GERARD J. SMOLIN

---

NATURE OF PROCEEDINGS:

/X/ HEARING ON:  
Petitioners' Order To Show Cause  
Dated Aug. 15, 1984.  
Re: Petition For Writ Of Habeas  
Corpus

---

MINUTE ORDER:

The Court hears argument of  
Counsel.  
Petitioner's Order To Show Cause  
is Granted.

Petitioner is Ordered Discharged  
from Constrained Custody;  
Petition For Writ of Habeas Corpus  
is Granted.

I certify that copies of the above  
Order were mailed to counsel of  
record as indicated on \_\_\_\_\_  
Date

\_\_\_\_\_  
Court Clerk

Sep 41984 2623

EXH. 1

SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
FOR THE COUNTY  
OF SAN BERNARDINO

ACIS CASE NO.:C 0156942  
CASE NO.:SCV 224030  
JUDGE:WILLIAM PITT HYDE  
DATE: TIME:  
08/24/84 01 30 PM  
DEPT:01  
CLERK:JENNIFER DEARDOFF  
Albert Maldonado  
JOSEPH BURNS, DDA  
BAILIFF: ANTHONY JAIME  
REPORTER: EVA PALMER  
CASE TITLE: IN THE MATTER OF  
GERARD J. SMOLIN

---

NATURE OF PROCEEDINGS:

/X/ HEARING ON:  
Petitioners' For Writ of Habeas  
Corpus  
Dated Aug. 15, 1984.  
Re: Petition For Writ Of Habeas  
Corpus

---

MINUTE ORDER:

The Court hears argument of  
Counsel.  
The Court finds Declaration of  
Respondent/Defendant are  
insufficient to establish her  
rights in that the State of  
Louisiana:

The Petitioner Is Granted.

Petitioner is Ordered Discharged  
from Constrained custody.

I certify that copies of the above  
Order were mailed to counsel of  
record as indicated on \_\_\_\_\_

Date

\_\_\_\_\_  
Court Clerk

Sep 41984 2624

EXH. 2

Unreported Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, in case No. E001358, filed March 26, 1985, is reprinted as Appendix B to the Petition for Certiorari

Opinion of the California Supreme Court in case No. LA 32068 filed May 1, 1986, is reprinted as Appendix A to the Petition for Certiorari (opinion reported at 41 Cal.3d 758, 716 P.2d 991)

Order of the California Supreme Court denying rehearing, filed June 5, 1986, is reprinted as Appendix D to the Petition for Certiorari

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

In re the Marriage of	)	
RICHARD SMOLIN and	)	
JUDITH SMOLIN	)	
<hr/>		
RICHARD SMOLIN,	)	
	)	
Respondent,	)	No. E001146
	)	(Super.Ct.
v.	)	No.FL 30380)
	)	
JUDITH SMOLIN POPE,	)	OPINION ON
	)	REHEARING
Appellant.	)	
<hr/>		

APPEAL from the Superior  
Court of San Bernardino County.  
William Pitt Hyde, Judge. Reversed.

Don A. Haskell for Appellant.

Riordan & Rosenthal,

Dennis P. Riordan and Albert H.

Maldonado for Respondent.

Judith Smolin Pope appeals from an order confirming a prior order granting sole custody to her former husband, Richard Smolin, and terminating child support.

FACTS

The parties were married in San Bernardino County. The two minor children, Jennifer Leann, born May 31, 1973, and Jamie Christopher, born October 16, 1974, resided in San Bernardino County until November 1979, when Judith removed them from the State of California.

Judith and Richard obtained a final judgment of dissolution of their marriage on April 6, 1978, in the San Bernardino Superior Court. The judgment provided that custody of the minor children was awarded to Judith

with rights of reasonable visitation to Richard.

In August of 1979, Judith was married to her present husband, James Pope, and in November of 1979 she moved with Mr. Pope and the minor children to Oregon. Judith did not advise Richard of her intent to move to Oregon until after she had moved, although she had agreed as a part of their settlement agreement not to leave the state without his consent. Richard received notice of the move about a week after it had occurred. Thereafter, Mr. Pope, who was in the construction business, was offered a position in Dallas, Texas and the family moved to Texas in January of 1980. Again Judith did not inform Richard, and he did not learn of their whereabouts until several months later.

On September 15, 1980, Judith commenced a proceeding in Texas for judicial notice of the California statutes and the California judgment. Richard was served but did not appear in that action.

Thereafter, on October 3, 1980, Richard filed an order to show cause in the San Bernardino Superior Court to modify custody. Judith was served but did not appear. Richard did not advise the California court that a proceeding had been commenced in Texas. On October 27, 1980, Richard obtained an order modifying custody and awarding him joint custody but with primary care remaining with Judith. Richard was granted custody during summer vacations and during the Christmas vacation of 1980. Judith's Texas attorney was served with a copy of this order. He

advised Richard's attorney that it was his opinion the order was not enforceable in Texas due to the lack of jurisdiction in the California court. On January 9, 1981, Richard brought an order to show cause against Judith for contempt of the 1980 joint custody order. He also sought a modification granting him sole custody.

On February 13, 1981, the Texas court issued a decree extending full faith and credit and confirming that Judith had custody of the minor children. There is nothing in the record to show whether Judith's attorney had advised the Texas court of the joint custody or that an order to show cause had been filed in the California court.

On February 27, 1981, the San Bernardino Superior Court found

that Richard had been denied Christmas visitation rights provided in the 1980 joint custody order and granted him sole custody of the children, subject to Judith's right to reasonable visitation. The court also terminated child support.

Richard did not then seek to obtain physical custody of the minors, but did not provide any support for them after December 1980.

In March of 1981, Judith's husband was again transferred and the family moved to Louisiana.

Richard testified that he learned of the children's whereabouts in October of 1982, through a friend of Judith's, and that he did not learn their precise address until January of 1983. He testified that he had his first telephone conversation after they

left Texas on January 13, 1983, and sent them gifts at Christmas in 1983. There was no further contact between Richard and the children until March 9, 1984, although Richard testified that he had some contact with the district attorney's office "towards the end of 1983" and started to discuss the possibility of securing a warrant in lieu of a writ of habeas corpus. However, no action was taken to secure the warrant until he was served in an adoption proceeding in Louisiana.

In January of 1984, Judith and her husband filed a petition in a Louisiana court for the adoption of the minors by Mr. Pope. Richard was served in that action sometime in February of 1984.

On March 9, 1984, at approximately 7:20 a.m., Richard,

without notice to Judith, removed the children from a school bus stop in Slidell, Louisiana.

As a result of the removal of the children without use of legal process and without notice to Judith, criminal proceedings were initiated, Richard was charged with kidnapping, and extradition was sought against Richard by the State of Louisiana.

(See San Bernardino Superior Court Case No. SCV 224030.)

In explaining his use of self-help, Richard testified as follows:

"Q (BY MR. RICHARDSON) Now, I believe it was in January, you testified that you were served with a petition for a non-consensual [sic] adoption

and name change; is that correct?

"A That's correct.

"Q January of '84?

"A That's correct.

"Q And you were at that time contemplating the service of the warrant in lieu of writ of habeas corpus?

"A I had thought about it because I had previous contact with the District Attorney's Office. But upon receipt of the non-consensual [sic] stepparent adoption, petition and name change, it was the very first step that I took to secure my custody of the children.

"Q Now, was it your understanding that if this

warrant in lieu of writ were served in Louisiana, that the children would immediately be returned to you in California or that there would be some proceedings?

"A It was my understanding that if I attempted to use the warrant in lieu of writ of habeas corpus in light of a stepparent adoption proceedings pending, that the -- all the issues would end up being litigated in Louisiana, including the validity of the California order."

On April 11, 1984, Judith initiated an order to show cause in the San Bernardino Superior Court to set aside the custody order of February 27,

1981, whereby Richards was awarded sole custody and child support was terminated. It is from the court's reaffirmation of those orders on May 31, 1984 that this appeal has been taken.

DISCUSSION

Judith raises the following issues on appeal:

(1) Did the California court have jurisdiction over the custody issues?

(2) Assuming jurisdiction, did the trial court abuse its discretion by exercising jurisdiction and removing physical custody from appellant in light of respondent's unclean hands?

(3) Did the trial court abuse its discretion by finding it in

the best interests of the children to confirm sole custody in the respondent?

I. Jurisdiction

The Uniform Child Custody Act, Civil Code section 5152,<sup>1/</sup> sets forth jurisdictional grounds in child custody matters. The provisions pertinent to this case are as follows:

"(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

"(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within

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1. All statutory references are to the Civil Code unless otherwise stated.

six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or persons acting as parent continues to live in this state.

"(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

". . . . .

"(3) Physical presence of the child, while desirable, is not a

prerequisite for jurisdiction to determine his custody."

It is clear that California was not the "home state" within the meaning of subdivision (a). "Home state" is defined by the Uniform Child Custody Act, section 5151, as follows:

"(5) 'Home state' means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six-months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period."

In January of 1981, when Richard initiated his first order to show cause for a modification of the custody decree, the children had not resided in the state of California since November 1979. They had been living with their mother and stepfather continuously since they left California and had resided in Texas for more than one year.

Thus, Texas was the home state within the meaning of subdivision (a) at the time Richard's initial request for modification was filed. Furthermore, the jurisdiction of the Texas court had already been invoked prior to the filing of his order to show cause for modification.

Nevertheless, the fact that Texas had become the home state did not

necessarily oust California of  
modification jurisdiction.

In Kumar v. Superior Court  
(1982) 32 Cal.3d 689, the California  
Supreme Court considered the difference  
between initial jurisdiction and  
modification jurisdiction and concluded  
that under section 5163,<sup>2/</sup> the strong  
presumption is that the decree state

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2. Section 5163 in part provides:

"(1) If a court of  
another state has made a  
custody decree, a court  
of this state shall not  
modify that decree  
unless (a) it appears to  
the court of this state  
that the court which  
rendered the decree does  
not now have  
jurisdiction under  
jurisdictional  
prerequisites  
substantially in  
accordance with this  
title or has declined to  
assume jurisdiction to  
modify the decree and  
(b) the court of this  
state has jurisdiction."

will continue to have modification jurisdiction until it loses all or almost all connection with the child.

Moreover, "'Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parents or another contestant continues to reside.'" (Kumar v. Superior Court, at p. 696, quoting with approval Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA (1981) 14 Fam. L.Q. 203, 214-215.)

In Kumar the Supreme Court found a "significant connection" with

the home state of New York although the child had been absent for 18 months at the time of the commencement of the California proceeding.

The basis for California modification jurisdiction in this case and the one relied on in the change of custody order, was subdivision (b). In its order of February 27, 1981, modifying custody, the court stated:

"1. That the minor children have sufficient contacts with the State of California to continue to provide a basis, for the Superior Court, State of California, County of San Bernardino, to exercise continuing and concurrent jurisdiction, pursuant to Civil Code section 5152, subdivision (1)(b) as construed together with Civil Code

section 4600 as amended and 4600.5 as enacted."<sup>3/</sup>

The San Bernardino Superior Court in the February 27, 1981, order went on to make the following findings:

"2. That the Petitioner has been frustrated in facilitating the order of this Court, dated October 27, 1980, with respect to the Christmas

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3. Civil Code section 4600 and 4600.5 do not assist in the determination of jurisdiction as section 4600.5 specifically provides in subparagraph (j) that: "Any order for the custody of a minor child of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section."

Moreover, the specific provisions of the Uniform Child Custody Act relating to jurisdiction prevail over more general provisions of Civil Code section 4600 and Code of Civil Procedure section 401.50. (In re Marriage of Steiner (1979) 89 Cal.App.3d 363, 371; Smith v. Superior Court (1977) 68 Cal.App.3d 457.

visit, provided in the order, as a result of Respondents [sic] refusal to allow any contacts between the Petitioner and said minor children.

"3. That it is not in the best interests of the minor children that the Petitioner be deprived of frequent continuing and meaningful contacts with the minor children. That it is in the best interests of the minor children that sole custody be awarded to the Petitioner subject to the Respondents [sic] right of reasonable visitation."

It is not enough merely to state that it is in the best interest of the children that a California court assume jurisdiction. Section 5152, subdivision 1(b) clearly requires that the finding of best interest be predicated upon the fact that "the

child and his parents, or the child and at least one contestant, have a significant connection with this state, and . . . there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

After a careful review of the record, we conclude that there is substantial evidence to support the finding of modification jurisdiction.

At the time of the initial hearing, although Judith had had continuous custody of the minor children since the parties' separation on March 9, 1977, when the children were aged 4 years (Jennifer) and 2 years (Jamie), Richard had exercised his right to visitation until Judith

removed them from with the State of California in November of 1979.

Because the children had spent the first several years of their lives in California, and the father continued to exercise visitation with the children until prevented by Judith's removal of the children, it cannot be said that there was insufficient evidence to support the trial court's finding of a significant connection with the state within the standard established by Kumar.

## II. Unclean Hands

Judith contends that, even if the California superior court had jurisdiction at the time of the modification hearing, it was an abuse of discretion to exercise jurisdiction because of Richard's unclean hands.

The Uniform Child Custody Act, section 5157, provides in pertinent part as follows:

"(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction for purposes of adjudication of custody if this is just and proper under the circumstances.

"(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other

temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances." (Emphasis added.)

It is clear that if Richard had made an initial application for custody after the removal of the children from Louisiana without legal process and without the knowledge of the mother, the court could have declined jurisdiction pursuant to the discretionary provisions of subdivision (1).<sup>4/</sup>

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4. It is also noteworthy that if Judith had sought to modify the California decree in another Uniform Code state, that state court could have declined jurisdiction pursuant to the discretionary provision of subdivision (2), based upon her removal of the

However, because the abduction did not occur until after Richard's successful application for modification in the San Bernardino court, the mandatory provisions of subparagraph (2) do not apply. In any event, Judith may not now collaterally attack the February 1981 order on any but jurisdictional grounds.

III. Abuse of Discretion

The order before this court on appeal is the order of May 31, 1984, "reaffirming" the sole custody in Richard which was granted under the order of February 27, 1981. Therefore, it is the May 1984 order we must consider in the light of appellant's argument that the court abused its

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children from California in violation of the custody order.

discretion in granting Richard physical custody of the children.

At the time of the hearing leading to that order, both parties were before the court with unclean hands. Judith had removed the children from the State of California without notice and had otherwise frustrated Richard's right to visitation with the children. Richard had failed to pay child support even prior to the time he obtained a court order that, if properly executed, would have relieved him of that requirement. Further without the use of legal process Richard had removed the children from Louisiana without notifying Judith either before or after the abduction.

Clearly the conduct of both parties and particularly Richard's manipulation of the court in respect to

obtaining custody of the children is violative of many of the stated purposes of the Uniform Child Custody Act, which are, in pertinent part, as follows:

"(1) The general purposes of this title are to: . . .

"(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

"(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

"(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards. . . ." (\$ 5150.)

Nevertheless, because we have found that the San Bernardino Superior Court had jurisdiction, the only remaining issue before this court is whether the trial court abused its discretion when it confirmed the award of sole custody of the children to Richard.

At the time of these proceedings Civil Code section 4600.5 read in part as follows:

"(a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage.

"(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602.

"(c) Whenever a request for joint custody is granted or denied, the

court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interests of the child shall not be sufficient to meet the requirements of this subdivision.

" . . . . .

"(j) Any order for the custody of a minor child of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section."

In connection with the May 1984 order, no request was made for a statement of reasons pursuant to

subdivision (c). However, the court made a lengthy statement at the time the decision was rendered.

That statement included the following comments on the evidence.

"These children love and respect the parties involved in this case.

". . . . .

"This case is a difficult one in that in the ordinary custody case, we have a tug and pull between parents. But they are at least somewhat on a par. And whatever we decide, we can assure communication, and we can assure, by order or otherwise, continuing relationships.

"I have serious concerns about this case. I think we are into a position now where we cannot guarantee that. I don't see how this can can be

solved with the standard approach. And I think it's -- it is -- at this juncture, we are in a hopeless Catch 22 position.

"Let me throw out a couple of possibilities. Number one, what do we do with these children if we give them in effect to Mrs. Pope and say, well, you've done such a good job with them up to now, you should continue. And -- but -- and we now accept what you tell us, that you guarantee to Rick Smolin the rights of contact and sharing of growing-up children that the law requires, and that you, Mrs. Pope, now say you recognize.

". . . . .

"On the other hand, if we leave the children with Mr. Smolin, what guarantee do we have that, Mrs. Pope, that you can have meaningful

contact and sharing of contact with these children? Because if Mr. Smolin has his say about it, it may well be that those children will not travel to Louisiana for visitation and that some form of visitation will have to be structured out here.

". . . . .

"So we then come to the decision of what do we do with these -- with these children.

"There is no question in my mind that the Popes are caring and concerned parents. They obviously are caring and concerned parents. I've had an opportunity to witness that from the testimony of the parties on the witness stand and also in the handling of their own small child here in the court when we invited the child to be present so

that the parties could hear what was going on.

". . . . .

"We know that the Popes, as I indicated, are caring and concerned parents. We don't know about Rick Smolin. Rick Smolin hasn't had the chance. And he didn't have the chance because -- this Court concludes -- that his efforts at having that chance were frustrated at every turn. They were frustrated to the extent that he did not accomplish any contact -- any meaningful contact with these children for essentially their whole childhood, since the date of separation.

"Why weren't his attempts better or more forceful or more persistent or more skillful? I can't answer that . . . .

". . . . .

". . . The evidence is that he made every reasonable effort to maintain a relationship with the children and to exercise the visitation rights which he always had through the State of California proceedings.

"The Court would further find that his attempts at this were frustrated by direct and deliberate acts on the part of Mrs. Pope, and those acts were taken with full acquiescence at least, and perhaps under the direction or dominance exercised over her by Mr. Pope.

". . . . .

"Again, the parties have put themselves in this spot. I can only extricate you from this spot to the point of my abilities of making an order at this point. And the order of the Court has been, since the 19- --

since the prior order of the change of custody, been one where custody is with Mr. Smolin. I see no reason to change that order.

"The order of the Court will either be reaffirmed, however you want to phrase it as far as the formal orders are concerned. The order is reaffirmed that custody is with him and is solely with him.

"And the reason it is sole and not joint I think is obvious from the comments of the Court. Joint custody is not a situation that will work in this atmosphere of litigation that now spans two states and perhaps involves federal proceedings as well.

"The visitation -- this Court will not at this juncture get itself into a spot of trying to dictate how these people are going to solve this

problem. The visitation of Mrs. Pope should be reasonable, and the Court will leave it at that. That of course is a touchy situation, because it puts Mrs. Pope at the mercy of Mr. Smolin in dictating the terms and conditions of visitation. If we wanted to be harsh about it, we could say it's merely now putting the shoe on the other foot."

(Emphasis added.)

There is nothing in the record to suggest that there was any investigation of the respective homes or other circumstances of the background provided by the two families. The only evidence presented by the Family Court Services Mediator with respect to any investigation was that she interviewed all the parties. No testimony was given relating any independent investigation by the

mediator and the only reference to the school records of these children were statements of the children themselves regarding preferences.

Yet based upon this limited evidence the court awarded the father sole custody of these children, now aged 10 and 12 years, without any structured provision to guarantee visitation by the mother.

While it is certainly sad that the father's efforts at visitation were frustrated to the extent they were, that alone does not provide adequate factual basis to support an award of sole custody to the father. Absent any showing that it is in the best interest of the children for them to be separated from the mother who has had the responsibility of their care and nurturing for their entire lives,

the sole custody order in this case can only be viewed as punitive.

We find that it was an abuse of discretion for the trial court to confirm the award of sole custody in this case.

The other awarding custody to Richard is reversed and the matter remanded for further proceedings consistent with the Uniform Child Custody Act.

NOT FOR PUBLICATION.

MORRIS

P.J.

We concur:

MC DANIEL

J.

RICKLES

J.

DECLARATION OF SERVICE BY MAIL

Case Name: People of the State of  
California v. Superior  
Court of the State of  
California, for the  
County of San Bernardino  
(Richard Smolin and Gerard  
Smolin, Real Parties in  
Interest.)

Court No. 86-381

(Service Pursuant to United States  
Supreme Court, Rule 28(5)(c))

I declare that I am employed  
in the County of Sacramento,  
California. I am 18 years of age or  
older and not a party to the within  
entitled cause; my business address is  
1515 "K" Street, Suite 511, P. O.  
Box 944255, Sacramento, California  
94244-2550.

On January 15, 1987, I served  
that attached JOINT APPENDIX, in said  
cause, by placing a true copy thereof  
enclosed in a sealed prepaid, in the  
United States mail at Sacramento,  
California, addressed as follows:

Dennis P. Riordan, Attorney at Law  
523 Octavia Street  
San Francisco, California 94102

Declaration of Service  
Page 2

I declare under penalty of perjury that all parties required to be served have been served, and the foregoing is true and correct and that this declaration was executed at Sacramento, California, on January 15, 1987.

---

(Signature)

(5)

**COPY**

No. 86-381  
IN THE SUPREME COURT OF  
UNITED STATES

Supreme Court, U.S.  
**THE FILED**  
**JAN 15 1987**  
JOSEPH F. SPANIOLO, JR.  
CLERK

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA.

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, FOR THE COUNTY OF  
SAN BERNARDINO,

Respondent,

RICHARD SMOLIN and GERARD SMOLIN,

Real Parties in Interest.

---

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF CALIFORNIA

---

**BRIEF FOR PETITIONER**

---

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71 pp

QUESTION PRESENTED

Consistent with Michigan v. Doran, 439 U.S. 282 (1978), may an asylum state court block extradition on the ground that the fugitive has not been "charged with a crime" because the court concludes, based on extrinsic evidence, that the fugitive is innocent?

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No. 86-381

IN THE SUPREME COURT OF THE  
UNITED STATES

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA,  
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SAN BERNARDINO,

Respondent,

RICHARD SMOLIN and GERARD SMOLIN,

Real Parties in Interest.

---

BRIEF FOR PETITIONER

---

OPINIONS BELOW

The opinion of the California  
Supreme Court (reported at 41 Cal.3d  
758, 716 P.2d 991) appears in  
Appendix A to the Petition for  
Certiorari (Pet. App. A). The opinion  
of the California Court of Appeal,  
Fourth Appellate District, Second

Division, (unreported decision in case No. E001358) appears in Appendix B to the Petition for Certiorari (Pet. App. B). The oral ruling of respondent San Bernardino County Superior Court (contained in a partial transcript of the proceedings of August 24, 1984, in case No. SCV-224030) appears in Appendix C to the Petition for Certiorari (Pet. App. C), and in the Joint Appendix (Jt. App., pp. 47-52).

JURISDICTION

The decision of the California Supreme Court was filed on May 1, 1986. The People's petition for rehearing was denied on June 5, 1986 (see Pet. App. D). This Court has jurisdiction under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

Article IV, Section 2,  
Clause 2, of the United States  
Constitution, the Extradition Clause,  
provides:

"A Person charged in any  
State with Treason, Felony,  
or other Crime, who shall  
flee from Justice, and be  
found in another State, shall  
on Demand of the Executive  
Authority of the State from  
which he fled, be delivered  
up, to be removed to the  
State having Jurisdiction  
over the Crime."

Title 18 U.S.C. Section 3182,  
the Federal Extradition Act, provides:

"Whenever the executive  
authority of any State or  
Territory demands any person  
as a fugitive from justice,  
of the executive authority of  
any State, District or  
Territory to which such  
person had fled, and produces  
a copy of an indictment found  
or an affidavit made before a  
magistrate of any State or  
Territory, charging the  
person demanded with having  
committed treason, felony, or  
other crime, certified as

authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, district or Territory to which the person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

California Penal Code

sections 1548.2, 1550.1 and 1553.2, part of the Uniform Criminal Extradition Act, appear in Appendix E to the Petition for Certiorari (Pet. App. E).

\* \* \* \*

STATEMENT OF THE CASE

A. The Underlying Offense  
and Louisiana's  
Extradition Request

On the morning of March 9, 1984, Richard Smolin and his father Gerard (real parties in interest in this case) took Richard's two young children from a bus stop in St. Tammany Parish, Louisiana, and brought them to California. (Pet. App. A, p. 4; Pet. App. B, p. 4.) At the time, the children were living in the custody of their mother (Richard's former wife), Judy Pope and their step-father in Louisiana.<sup>1/</sup> Three days later, the prosecutor in St. Tammany Parish charged the Smolins with two counts of

---

1. Richard and Judy were divorced in San Bernardino County, California, in 1978, at which time Judy was awarded custody of the children, (Pet. App. A, p. 2; Pet. App. B, p. 3.)

parental kidnapping<sup>2/</sup> and warrants for their arrest were issued. (Pet. App. A, pp. 4-5.)

On June 14, 1984, Governor Edwards of Louisiana executed requisition demands upon Governor Deukmejian of California for the arrest of the Smolins and their delivery to agents of Louisiana for return to that state. In accordance with the Uniform Criminal Extradition Act (UCEA), the demand was supported by certified copies of the bill of information and arrest warrants, a 1981 Texas court decree giving full faith and credit to a 1978 California court order awarding

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2. The bill of information charged a violation of La.Rev.Stat. § 14:45, subdivision (4) of which describes the crime as taking a child "from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state." (Pet. App. A, pp. 4-5.)

Judy custody of the children, and a sworn affidavit by Judy Pope which stated:

"On March 9, 1984, at approximately 7:20 a.m., Richard Smolin and Gerard Smolin, kidnapped Jennifer Smolin, aged 10, and James C. Smolin, aged 9, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana. The affiant has custody of the said children by virtue of a Texas court order dated February 5, 1981, a copy of said order attached hereto and made part thereof. The information regarding the actual kidnapping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmie Huessler of 2015 Dridle Street, Slidell, Louisiana.

Richard Smolin and Gerard Smolin were without authority to remove children from affiant's custody." (Pet. App. A, pp. 7-8.)<sup>3/</sup>

On August 6, 1984, the California governor notified the Smolins that he intended to issue warrants for their extradition, but would withhold issuance until August 23, 1984. (Pet. App. B, p. 6.)

B. Extradition Proceedings  
in the California  
Superior Court

Prior to their arrest on the Governor's warrants, the Smolins sought habeas corpus relief in the Superior Court of San Bernardino County

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3. The extradition papers also contained a Louisiana court order dated March 9, 1984, granting custody of the children to Judy and prohibiting their removal from the jurisdiction (St. Tammany Parish) pending a contested hearing on the custody matter. (Pet. App. A, pp. 7-8.)

(respondent in this case). The Smolins argued that they were not "substantially charged with a crime" as required under the UCEA because Richard actually had legal custody of the children when he took them from the Louisiana bus stop; therefore he and Gerard could not be guilty of a crime under Louisiana law. (Pet. App. A, p. 9.) A hearing on the Smolins' application was held on August 24, 1984. Over the People's objections, the superior court judge took judicial notice of the "family law file" involving the 1978 dissolution of the marriage of Richard Smolin and Judy Pope.<sup>4/</sup> (See Joint Appendix, pp. 47, 52.) Based on material in that file,

---

4. The habeas corpus proceedings were held before the same judge who presided over the earlier family law matter.

specifically a modified order issued three years after the dissolution which awarded custody of the children to Richard, the superior court found that Judy Pope's affidavit in support of the extradition demand contained falsehoods and granted habeas corpus relief. (Jt. App., pp. 47-52.) In so doing, the court quoted at length directly from the record of the family law case, and then concluded "that the findings in the family law case adequately demonstrate that, in fact, the process initiated by Mrs. Pope in Louisiana and her declarations and affidavits were totally insufficient to establish any basis for rights of either herself personally or for the State, in an [sic] interest of the State of Louisiana." (Jt. App., p. 52; Pet. App. C.)

C. The Family Law Case  
Background<sup>5/</sup>

Richard and Judy's California marriage was dissolved in April of 1978 by the Superior Court of San Bernardino County. Judy was awarded custody of the two children, Jennifer, then age 4, and Jamie, age 3. (Jt. App., p. 61<sup>6/</sup>)

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Judy remarried late in 1979 and in

5. This information is provided for background only. Despite repeated, strenuous objections by the People, the superior court took judicial notice of the "family law file," which contained the facts surrounding the custody dispute between Richard Smolin and Judy Pope. Whether such judicial notice was proper in the context of a challenge to extradition is a fundamental issue in this case; the People maintain that these facts are irrelevant to the only issues cognizable in such a challenge.

6. The Joint Appendix, pages 60-98, contains a copy of the unreported opinion of the California Court of Appeal, Fourth District, Division Two, filed February 25, 1986, in case No. E001146. This case was the appeal by Judy Pope of the superior court's decision confirming its prior order giving Richard Smolin sole custody of the children.

January of 1980 moved with her present husband, Mr. Pope, and the children to Texas, where Mr. Pope had taken a job. Richard apparently did not learn of this move for several months. (Jt. App., p. 62.)

In September of 1980, Judy commenced an action in Texas to obtain a full faith and credit decree recognizing her 1978 California custody order. Richard was served but did not appear in that action. A month later, Richard commenced a proceeding in respondent superior court to modify the original custody order; he did not advise the court of the pending proceedings in Texas. Judy was served but did not appear in these California proceedings. (Jt. App., p.63; Pet. App. A, p. 3.)

On October 27, 1980, respondent court modified the original custody order and awarded Richard joint custody. Judy was served with this modified order, but her attorney felt it was unenforceable due to lack of jurisdiction in the California court. (Jt. App., pp. 63-64.)

On February 13, 1981, the Texas court issued its decree extending full faith and credit to the original California order giving Judy custody. Two weeks later, Richard obtained a second modification from respondent court, this time awarding him sole custody. (Jt. App., pp. 64-65.)

In March of 1981, Judy's husband was transferred and the family moved to Louisiana. According to Richard, he did not learn of the children's whereabouts until October of

1982; he spoke to them over the telephone in January of 1983 and sent them gifts the following Christmas. (Jt. App., pp. 65-66.)

In February of 1984, Richard was served in an action commenced by Judy and Mr. Pope in Louisiana for the adoption of the children by Mr. Pope. Richard did not appear in that action; instead, on March 9, 1984, a week before the Louisiana proceedings were to be heard, Richard and his father, Gerard, abducted the children from a bus stop in Slidell, Louisiana. At no time did Richard seek to enforce his California decrees in the courts of either Texas or Louisiana. (Jt. App., pp. 66-69.)

In April of 1984, Judy appeared in respondent court and sought to set aside Richard's sole custody

order. A month later, the court reaffirmed its order and Judy subsequently appealed. In February of 1986, the appellate court reversed on the basis that respondent court abused its discretion in reaffirming the 1981 order giving sole custody to Richard. (See footnote 6, supra; Jt. App., pp. 60-98.)

D. Extradition Proceedings  
In California Appellate  
Courts

Meanwhile, the People sought review of respondent court's order barring extradition by way of a writ of mandate in the Court of Appeal, Fourth Appellate District.<sup>7/</sup> That court reversed the order of respondent

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7. State law permits such extraordinary relief in extradition matters because it typically produces a much speedier resolution than direct appeal. (See People v. Superior Court (Lopez) 130 Cal.App.3d 776, 779-780, 182 Cal.Rptr. 132, 134 (1982).)

superior court, holding that the lower court improperly took judicial notice of the California decree giving Richard Smolin custody since such extrinsic evidence simply offered an affirmative defense which could only be raised in the Louisiana court. (See Pet. App. B.)

Real parties (the Smolins) sought review of the court of appeal's ruling in the California Supreme Court, which granted hearing in May of 1985. A year later, on May 1, 1986, the state supreme court issued its opinion, reversing the court of appeal and holding that respondent superior court was correct in taking judicial notice of the extrinsic evidence that Richard had been awarded custody by a California court. (See Pet. App. A.) The state supreme court denied the

People's petition for rehearing on June 5, 1986. (See Pet. App. D.)

The California Supreme Court acknowledged the limited scope of the inquiry permitted the asylum state's courts in extradition proceedings (Pet. App. A, pp. 13-14, 18), but nevertheless held that judicial notice of the Smolin-Pope "family law file" was permissible because it contained "historic facts readily verifiable," thus rendering its ruling in "complete harmony" with this Court's holding in Michigan v. Doran , 439 U.S. 282, 289, (1978). Further, the state supreme court asserted that the important governmental interests at stake in the prompt execution of extradition requests are "not jeopardized" by its holding. It reasoned that "[s]ince Louisiana would be compelled under the

terms of the PKPA [28 U.S.C.A. § 1738A(a)] to take judicial notice of the California order, there is no justification for withholding recognition by a California court." (Pet. App. A, p. 35.) The court thus concluded that "the efficiency of the extradition process is enhanced rather than hampered by a resolution of the issue by a California court." (Pet. App. A., p. 36.)

\* \* \* \*

SUMMARY OF ARGUMENT

This Court has repeatedly recognized that the Extradition Clause was intended "to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed." Michigan v. Doran, 439 U.S. 282, 287; Biddinger v. Commissioner of Police, 245 U.S. 128, 132-133 (1917); Appleyard v. Massachusetts, 203 U.S. 222, 227 (1906). It was likewise intended to preserve harmony and comity among the states by "preclud[ing] any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkaniz[ing]' the administration of criminal justice among the several states." Michigan v. Doran, supra, at p. 287.

In furtherance of these purposes, the role of the courts in an asylum state is extremely limited. They are strictly precluded from inquiring into the question of the guilt of the accused and may not consider any affirmative defenses to the crime charged. Michigan v. Doran, supra, at p. 288-289; Biddinger v. Commissioner of Police, supra, at p. 135. While a court may entertain the issue of whether the person is "charged" with a crime, this question is one of law, to be determined upon the face of the extradition documents. Roberts v. Reilly, 116 U.S. 80, 95 (1885).

The actions of the courts of California in this case reflect a total disregard for these fundamental principles of extradition law and

result in the frustration of the purposes of the Extradition Clause. Real parties as much as acknowledged that the requirements for extradition had been met by the State of Louisiana -- and there was no argument on the issues of identity and "fugivity." (Jt. App., pp. 12, 26-27.) Yet respondent superior court, and later the California Supreme Court, accepted real parties' invitation to look beyond the face of the extradition papers to determine whether they were "charged" with a crime. Thus, the state courts judicially noticed a decree issued three years prior to the abduction -- a decree issued by respondent court -- which awarded custody to real party Richard Smolin.

Having determined that because of this decree Mr. Smolin could

not be found guilty in Louisiana, the California courts concluded he is not "charged" with an offense there. The fallacy of this reasoning is self-evident. Such an approach will inevitably lead to "trials" of the charges in asylum states -- an exercise at odds with the principles and precedent governing extradition law.

By taking judicial notice of evidence extrinsic to the extradition documents, albeit evidence within its own files, the California court crossed the line into a domain exclusively reserved to the State of Louisiana: the determination of guilt or innocence. In upholding the action of respondent superior court, the California Supreme Court has misconstrued the clear holdings of this Court and distorted the concepts of

interstate comity and efficiency in bringing fugitives to justice. In essence, that court has said, because it appears to us that Mr. Smolin could not be found guilty in Louisiana, he is not "substantially charged" with a crime.

The danger of this unprecedented holding is clear; and it has been recognized by at least 20 other states and territories, including Louisiana, who joined as amici curiae in support of California's petition for writ of certiorari. This Court should reverse the California court's decision and once again reaffirm existing precedent which establishes that guilt may only be determined in the demanding state, and whether a person is charged with a crime is a question of law upon

-24-

which evidence outside the extradition  
papers may not be considered.

\* \* \* \*

ARGUMENT

- I. RESPONDENT COURT AND THE CALIFORNIA SUPREME COURT HAVE EXCEEDED THEIR JURISDICTION BY CONSIDERING EXTRINSIC EVIDENCE ON THE QUESTION OF WHETHER REAL PARTIES ARE "SUBSTANTIALLY CHARGED" WITH A CRIME

Article IV, section 2,  
clause 2, of the United States  
Constitution provides:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

This clause has been implemented by  
Congress in Title 18, U.S.C.

section 3182, and it has been  
supplemented by the states through the  
adoption of the Uniform Criminal  
Extradition Act. In California, the  
pertinent provisions are Penal Code  
sections 1548.2, 1550.1 and 1553.2.

Together, these provisions create a mandatory duty upon the asylum state to deliver to a demanding state a person charged with a crime there. Extradition was intended to be a summary executive proceeding in which the judiciary plays an extremely limited role. (Michigan v. Doran, 439 U.S. 282, 288, (1978).)

In Michigan v. Doran, this Court defined the limits of the inquiry which an asylum state court is permitted to make:

"[T]he courts of an asylum state are bound by Art. IV, § 3182, and where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met . . . . Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for

extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." (439 U.S. at pp. 288-289; see also Pacileo v. Walker, 449 U.S. 86, 87, (1980).)

Real parties have admitted they are the persons who took the children and whose extradition is sought by Louisiana authorities, and there is no question that the extradition documents on their face are in order. (Pet. App. A, p. 4, dissent.) Real parties argued, and the state supreme court held, that they are not "substantially charged"<sup>8/</sup> with a

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8. This term derives from earlier decisions of this Court (Munsey v. Clough, 196 U.S. 364, 373 (1905); Pearce v. Texas, 155 U.S. 311, 313 (1894); and is used in the UCEA (§ 3). (Cal.Pen. Code, § 1548.2.) The adverb "substantially" does not add anything to the constitutional requirement that the person be charged. It simply means that the substance of a criminal charge must be alleged against the person. (See Michigan v. Doran, *supra*, 439 U.S. at p. 285; People v. Noble, 169 NYS.2d 181, 184, (1957); Procter v. Skinner

crime in Louisiana. However, the state court confused the question of whether respondents are substantially charged with a crime with the question of whether they are innocent.

Whether a person is substantially charged with a crime against the laws of the demanding state "is a question of law and is always open upon the face of the papers to judicial inquiry on an application for a discharge under a writ of habeas corpus." (Roberts v. Reilly, 116 U.S. 80, 95, (1885) emphasis added.) The courts which have considered this question agree that the inquiry on this issue may not go beyond the face of the

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659 P.2d 779, 782, (Ida. 1982) ; People v. Sheriff of Westchester County 166 NE 795, 796 (NY 1929); see generally, Matter of Strauss 197 U.S. 324, 331, (1905).)

extradition documents.<sup>9/</sup> No cases have been found which permit the consideration of evidence extrinsic to the documents on the issue of whether the fugitive is substantially charged; certainly the California Supreme Court found none to support its unprecedented holding.

In Biddinger v. Commissioner of Police, 245 U.S. 128 (1917), this Court addressed the question of what extrinsic evidence is admissible in an

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9. See, e.g., United States v. Flood, 374 F.2d 554, 556, (2d Cir. 1967); Moncrief v. Anderson, 342 F.2d 902, 904, (DC Cir. 1964); Kerr v. Watson, 649 P.2d 1234, 1238, (Ore. 1982); Fisco v. Clark, 414 P.2d 331, 333 Ex parte Paulson (Ore. 1942) 124 P.2d 297, 300, (Ore. 1966); Ex parte Harrison, 568 SW2d 339, 342, (Tex. 1978); Eroh v. Sheriff, 272 NW2d 720, 722, (Mich. App. 1978); Black v. Miller, 59 F.2d 687, 690, (9th Cir. 1932). Also, for a case very similar to the case at bench, see People ex. rel. Leach v. Baldwin, 174 NE 51, (Ill. 1930).

extradition habeas corpus proceeding. There it was stated "that when the extradition papers required by the statute are in proper form the only evidence sanctioned by this Court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed . . . ." (245 U.S. at p. 135.) Fugitivity being a question of fact, extrinsic evidence is permitted - not so as to the question of law whether the fugitive is substantially charged.

No principle of extradition law is more settled than that the asylum state may not inquire into the guilt or innocence of the accused or consider any affirmative defense to the crime. (UCEA § 20 (Calif. Pen. Code,

§ 1553.2); Michigan v. Doran, supra,  
Biddinger v. Commissioner of Police,  
supra; Drew v. Thaw, 235 U.S. 432, 439-  
440 (1914); Strassheim v. Daily, 221  
U.S. 280, 283, 286 (1911).) Yet, when  
an asylum state court admits extrinsic  
evidence, for example to attack the  
veracity of the complaining witness as  
in this case, the court is doing  
nothing more nor less than permitting  
the introduction of an affirmative  
defense which should only be permitted  
in the demanding state, where the  
charges are pending.<sup>10/</sup> This evidence

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10. The superior court below  
based its order granting habeas corpus  
relief on a finding that the averments  
of the complaining witness in her sworn  
affidavit were false. (This finding by  
the court was not surprising - it  
simply reflected the same judge's  
earlier conclusions in the family law  
matter.) However, in deciding the  
question of whether there is a  
substantial charge, the asylum state  
court may not inquire into the truth of  
the allegations. (Pierce v. Creecy,

does not establish that the accused has not been charged, it only suggests that he might be innocent. Even if that be the case, it is a question only the demanding state's courts have jurisdiction to determine. (Drew v. Thaw, supra, 235 U.S. p. 439.)

In Drew v. Thaw the fugitive, accused of escape from a mental institution, contended in his habeas corpus challenge to extradition that if he was insane at the time he contrived his escape he could not be guilty,

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210 U.S. 387, 403, (1908); see also People v. Schneckloth, 660 P.2d 1293, 1295, (Colo. 1983); Stack v. State ex rel. Morgan, 381 So.2d 366, (Fla. App. 1980).) "An attack on credibility is, in effect, an attack on the demanding state's finding of probable cause. Such an attack is possible only in the courts of the demanding state. [Citations.] Once a court in the asylum state has satisfied itself with the facial validity of the documents, no further inquiry is appropriate on this issue. [Citations.]" (People v. Schneckloth, supra, at p. 1295.)

while if he was not insane he was entitled to be discharged from the institution anyway. He claimed the facts in the record required a finding that he was insane. This Court disposed of the contention, declaring:

"But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried . . . . When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that State and the reasonable possibility that it might be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculation as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." (235 U.S.

at pp. 439-440, emphasis added.)

Had the reasoning of the California courts prevailed in Drew v. Thaw, the courts of New Hampshire could simply have taken "judicial notice" of Thaw's New York mental commitment (certainly an "historic fact readily verifiable"), found that as an insane person he could not have committed the crime charged there, and concluded that he was therefore not "substantially charged." Yet this argument was made, at least implicitly, by Thaw -- and flatly rejected by this Court. There is no reason to believe a different decision would have resulted had a document committing Thaw to the insane asylum been produced. Simply put, this Court eschewed any inquiry beyond the face of the papers on the question of the charge of a crime; no speculation

as to the ultimate result of a trial is permissible.

This principle was echoed a few years later in South Carolina v. Bailey, supra, 289 U.S. 412, where the accused raised the question of fugitivity on habeas corpus in the asylum state: "It was wholly beyond the province of the judge [on habeas corpus] to speculate, as he seems to have done, concerning the probable outcome of any trial which might follow rendition to the demanding State." (289 U.S. at p. 420.)

The underlying reasoning of the California Supreme Court herein is that because real parties should be found not guilty in Louisiana (in light of Richard's California custody order), they are not charged with a crime. This sophistry is in absolute

contradiction to the settled principles announced by this Court in Drew v. Thaw, South Carolina v. Bailey, Roberts v. Reilly and other cases.

It is significant that absolutely no case authority was cited by the California courts, or offered by real parties, in favor of the proposition that extrinsic evidence is admissible on the question of whether a fugitive is substantially charged. The two cases apparently relied upon most heavily by the state supreme court do not support its holding. In People ex rel. Lewis v. Com'r of Correction, 417 NYS.2d 377 (1979), it was held that an asylum state court may inquire whether the act alleged in the extradition papers constitutes a crime according to the law of the demanding state. That a court may judicially notice the law of

Richard Smolin. Indeed, petitioner certainly recognizes California's interest in protecting and upholding its custody orders. The point of the foregoing discussion is simply that the matter of Richard's defense to the Louisiana charge is subject to dispute. As in all cases, there are two sides to this litigation. Louisiana should not have to appear in the courts of California to refute a defense to its charges raised in the context of an extradition hearing. As stated so succinctly by Justice Homes: "The case is not to be tried on habeas corpus." Strassheim v. Daily, 221 U.S. 280, 283, 286 (1911).

Despite the judicial creativity demonstrated by the California Supreme Court in its claim of consistency with Michigan v. Doran

act charged was not in the abstract a crime under California law at that time, since a partner could not be guilty of theft from his own partnership. Again, contrary to the California Supreme Court's attempt to liken that case to the present one, Varona did not involve consideration of evidence outside the extradition papers themselves. Rather, it was limited to the face of the extradition documents.

The present case itself provides a clear illustration of why extrinsic evidence should not be considered on this issue. Real parties have repeatedly averred, and the courts of California have apparently agreed, that there is simply no question that Richard Smolin's California custody order is an air-tight defense to the criminal charge because under federal

law and the Uniform Child Custody Jurisdiction Act (UCCJA) Louisiana must recognize the decree. However, there is a basis upon which that decree could be challenged.

There is no doubt that concurrent jurisdiction can exist in more than one state at a given time to render orders regarding the custody of children. This was recognized by the state appellate court in the custody case regarding Richard Smolin and Judy Pope: while upholding the modified custody order in Richard's favor, the court acknowledged that Texas had acquired "home state" jurisdiction because Judy and the children had lived there for nearly a year. Moreover, Judy had invoked that jurisdiction by seeking full faith and credit recognition by the Texas courts

of the original California decree.  
(Jt. App., p. 74.) Both the UCCJA<sup>11/</sup>  
and the federal Parental Kidnapping  
Prevention Act (PKPA)<sup>12/</sup> address the  
concurrent jurisdiction situation;  
indeed, a principal purpose underlying  
these statutes is to determine, as  
between two states with concurrent  
jurisdiction, which one should exercise  
its jurisdiction. Both acts preclude  
the exercise of jurisdiction by a court  
if there are already custody  
proceedings pending in a court of  
another state which also has  
jurisdiction.<sup>13/</sup>

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11. See U.L.A., Master Edition,  
Volume 9.

12. 28 U.S.C.A. § 1738A.

13. Section 6(a) of the UCCJA  
provides:

(1) A court of this  
State shall not exercise its  
jurisdiction under this Act

The procedure outlined in the UCCJA contemplates that the parties will inform the court whether proceedings are pending in another

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if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(See Cal. Civ. Code § 5155(1).)

28 U.S.C.A. section 1738A(g) states:

"A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination."

state, and then requires the court to communicate with the court in the other state to determine which should exercise jurisdiction.<sup>14/</sup>

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14. Section 6(b) and (c) of the UCCJA provides:

"(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

"(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and

When real party

Richard Smolin sought his first modification, in October of 1980, the Texas proceedings were already pending -- and Richard had been notified of those proceedings. Texas was asked to exercise "home state" jurisdiction and judicially recognize the original

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communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this State has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

(See Cal.Civ. Code, § 5155(2) and (3).)

California decree. The California court, apparently not informed of the Texas proceedings, failed to comply with the UCCJA's communication requirement in order to prevent conflicting custody orders. Had Richard Smolin so informed the California court, the conflicting orders might have been avoided.<sup>15/</sup>

Petitioner is not now challenging the California custody order relied upon by real party Richard Smolin. Indeed, petitioner certainly recognizes California's interest in protecting and upholding its custody orders. The point of the foregoing discussion is simply that the

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15. Likewise, had Judy Pope advised the Texas court of the California modification, which took place prior to the issuance of the Texas decree, the conflict might not have occurred.

matter of Richard's defense to the Louisiana charge is subject to dispute. As in all cases, there are two sides to this litigation. Louisiana should not have to appear in the courts of California to refute a defense to its charges raised in the context of an extradition hearing. As stated so succinctly by Justice Holmes: "The case is not to be tried on habeas corpus." Strassheim v. Daily, 221 U.S. 280, 283, 286 (1911).

Despite the judicial creativity demonstrated by the California Supreme Court in its claim of consistency with Michigan v. Doran and other applicable precedents, the nub of its decision cannot be hidden. Perhaps it is best revealed by the court's astounding observation that "the efficiency of the extradition

process is enhanced rather than hampered by a resolution of the issue [of the effect of Richard's custody order on the Louisiana charges] by a California court." (People v. Superior Court (Smolin) 41 Cal.3d 758, 772 (1986).)<sup>16/</sup> While in many cases it may appear more "efficient" simply to determine a fugitive's guilt or innocence in the asylum state, such a

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16. The California Supreme Court cites Ierardi v. Gunter, 528 F.2d 929, 93 (1st Cir. 1976), at this point. In that case the court held that if the extradition papers did not show that a judicial finding of probable cause has been made in the demanding State, a court in the asylum State must do so as a prerequisite to interstate rendition. (Citing Gerstein v. Pugh, 420 U.S. 103 (1975).) Ierardi provides absolutely no support for the California court's decision in the present case. First, Ierardi was decided before Michigan v. Doran. Second, and more importantly, in the present case there was a judicial finding of probable cause made in Louisiana which was not reviewable in California. (Michigan v. Doran, supra, 439 U.S. at p. 290.)

practice not only ignores the mandate of the Constitution and pronouncements of this Court, but affronts the judicial system of the demanding state.

Real parties' own argument also plainly exposes their true position: "As the California Supreme Court noted, federal law requires that, sooner or later, the 1981 California decree be judicially noticed in resolving the issue of the Smolins' culpability on the kidnapping charge."

(Opp. to Pet. for Cert, p. 22.)

Obviously, real parties would prefer the resolution of their "culpability" take place "sooner," while they are still in California. But the law is clearly otherwise.

Just as real parties sought to avoid its family law court, they are now attempting to avoid Louisiana's

criminal court. Assuming real parties are correct that federal law requires all states, including Louisiana, to recognize Richard's California decree, it may well be asked why they have so vigorously and consistently refused to give any court outside California the opportunity to do so. They successfully transferred the forum for the custody dispute to California by abducting and removing the children from Louisiana, contrary to the spirit and purposes underlying both the PKPA and the UCCJA. Their attempt to litigate Louisiana's criminal charge in California should not meet with similar success.

"The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. [Citations.] The purpose of the Clause was to

preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states. It articulated, in mandatory language the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV . . . .

"The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." (Michigan v. Doran, supra, 439 U.S. at pp. 287-288, emphasis added.)

Here, the California courts went beyond a "preliminary inquiry;" they made a determination on the ultimate issue of real parties' guilt or innocence. The state supreme court's futile attempt to disguise this determination as a finding that real parties are not charged is readily transparent. This Court pointed out in

Pierce v. Creecy, supra, 210 U.S. 387,

401:

" . . . [I]t will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of a crime for reasons that are apt only to destroy its validity as a criminal pleading."

Similarly, the California Supreme Court paid lip service to the rule that there can be no inquiry into the issue of guilt or innocence in the asylum state, then held the fugitives are not substantially charged "for reasons that are apt" only to show their innocence.

\* \* \* \*

II. THERE SHOULD BE NO  
EXCEPTIONS TO THE RULE  
PROHIBITING THE CONSIDERATION  
OF EXTRINSIC EVIDENCE ON THE  
QUESTION OF WHETHER A PERSON  
IS SUBSTANTIALLY CHARGED

It has been suggested, by the California Supreme Court and by real parties in interest, that judicial notice of extrinsic evidence on the substantial charge issue is permissible under certain circumstances, for instance where the information is "readily verifiable." Thus, the state court proclaimed that its holding is in "complete harmony" with Michigan v. Doran because the custody order "is at least as verifiable as the other matters referred to in the Supreme Court's opinion, such as whether the petitioner is a fugitive from justice." (41 Cal.3d at p. 770.)

The response to this gross

misconstruction was perhaps best stated by Justice Lucas in dissent:

"The majority has put the cart before the horse. What the Supreme Court in Michigan v. Doran held was that there are only four matters that can be considered in habeas corpus extradition proceedings. Although the high court added that these four matters "are historic facts readily verifiable" (438 U.S. at p. 289), it did not hold that a court may consider any other matters (such as asylum state custody rulings or defenses to the crime charged) which may also be considered 'historic facts readily verifiable.' The four areas of inquiry described by the court were not illustrative. They were meant to define and restrict the actual boundaries of permissible inquiry. Thus, the trial court clearly exceeded its jurisdiction in considering the California custody ruling because that was not a matter fully under one of Michigan v. Doran's four categories." (41 Cal.3d at p. 775.)

Any attempt to carve out a narrow exception where the evidence is

readily available, even within the asylum state court's own files, would do nothing but create mischief and spawn challenges to extraditions never before contemplated. Nothing in the California court's opinion indicates its rationale would be limited to the rather unique facts of this case.

A number of instances can be cited where, as here, a legal document could be presented to show "no substantial charge." For example, an accused car thief could present a certificate of ownership to the allegedly stolen vehicle; an accused rapist could produce a certificate proving the alleged victim was his wife (in those states with no spousal rape laws); an accused bigamist could produce a divorce decree; one accused of nearly any crime could produce a

court order adjudging him insane or mentally incompetent (see Drew v. Thaw, supra, 235 U.S. at 439-440). An accused parental kidnapper who produces a custody decree is no different than these, no matter how readily accessible the extrinsic evidence is. What they have all shown is the existence of a defense, not the absence of a charge.

By refusing to accept real parties' invitation to make an exception in this case, even assuming the evidence from respondent court's family law file provides an absolute defense, this Court will reaffirm, in "bright line" fashion, the rules that whether an accused is substantially charged must be determined only on the face of the papers, and that affirmative defenses, no matter how

apparent, may be raised only in the demanding state.

Nor is an exception required to prevent the perpetration of fraud in the charging of crimes. Respondent superior court and real parties in interest have accused Judy Pope of perjury in her sworn affidavit in support of the charges. But contrary to real parties' claim, she did not swear that no decree in Richard's favor existed. (Opp. to Pet. for Cert., p. 25.) She declared that real parties "were without authority to remove children from affiant's custody," which she no doubt believed, since her attorney was of the opinion the modified California custody order was unenforceable for lack of jurisdiction. (Jt. App., pp. 63-64.)

Extradition is an executive function in which the courts play an extremely limited role. Michigan v. Doran, 439 U.S. at 287-289. Deference must be accorded the executive officers of both the demanding and asylum states. Primary reliance must be placed in them, along with the prosecuting authorities, for the bona fides of a criminal charge.

Here, for example, the California Governor took an inordinate amount of time (two months) after receiving the extradition demand before deciding to issue rendition warrants. The additional extraordinary procedure of notifying real parties nearly three weeks in advance that he intended to issue the warrants provided ample opportunity for them to appear in Louisiana voluntary to begin resolution

of the custody and criminal matters. Nevertheless, consistent with past conduct, they have resisted doing legal battle on any but their own turf.

In short, it is not necessary to create a limited "fraud exception" to the ban on judicial inquiry into another state's charges. In the rare case where such fraud is attempted, reliance upon the good faith and diligence of the executive officers will usually reveal the problem.

\* \* \* \*

CONCLUSION

The California holding amounts to a gross misinterpretation of Michigan v. Doran and cannot stand. Allowing consideration of extrinsic evidence on the question of whether the accused is charged inevitably leads a court into the issue of guilt or innocence - an inquiry strictly reserved for the demanding state. There is nothing in the state court's opinion to indicate its rationale would, or could, be limited to the specific facts of this case. No precedent supports the holding, and it is contrary to the letter and spirit of many pronouncements by this Court regarding the limits of an asylum state court's jurisdiction.

The constitutional protection at issue here belongs to the State of

Louisiana. It is guaranteed the right to obtain custody of persons against whom its officers have duly filed criminal charges. California has no jurisdiction to decide the fugitives' guilt or innocence and thereby deprive Louisiana at this right. The decision of the California Supreme Court violates the most fundamental principles underlying the law of extradition and must therefore be reversed. Further, this Court should resist any expansion of the limits of permissible judicial inquiry which have been so long and consistently established by its previous holdings.

For the foregoing reasons, it is respectfully requested that the decision of the California Supreme Court upholding respondent superior court's order barring real parties' extradition be reversed.

DATED: January 15, 1987

Respectfully submitted,

JOHN K. VAN DE KAMP  
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of the State of California  
STEVE WHITE, Chief Assistant  
Attorney General

J. ROBERT JIBSON, Supervising  
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JRJ:amr  
SA86US0005  
January 15, 1987

DECLARATION OF SERVICE BY MAIL

Case Name: People of the State of  
California v. Superior  
Court of the State of  
California, for the  
County of San Bernardino  
(Richard Smolin and Gerard  
Smolin, Real Parties in  
Interest.)

Court No. 86-381

(Service Pursuant to United States  
Supreme Court, Rule 28(5)(c))

I declare that I am employed  
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California. I am 18 years of age or  
older and not a party to the within  
entitled cause; my business address is  
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94244-2550.

On January 15, 1987, I served  
that attached BRIEF OF PETITIONER, in  
said cause, by placing a true copy  
thereof enclosed in a sealed prepaid,  
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follows:

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California Supreme Court  
360 McAllister Street, Room 4050  
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Hon. David L. Baker, Clerk  
County of San Bernardino  
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San Bernardino, California 92415-0210

I declare under penalty of  
perjury that all parties required to be  
served have been served, and the  
foregoing is true and correct and that  
this declaration was executed at  
Sacramento, California, on January 15,  
1987.

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(Signature)

6  
No. 86-381

Supreme Court, U.S.  
**FILED**

**FEB 21 1987**

JOSEPH E. BRANCO, JR.  
CLERK

**In the Supreme Court  
OF THE  
United States**

**OCTOBER TERM, 1986**

**PEOPLE OF THE STATE OF CALIFORNIA,  
*Petitioner,***

**VS.**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
FOR THE COUNTY OF SAN BERNARDINO,  
*Respondent,***

**RICHARD SMOLIN and GERARD SMOLIN,  
*Real Parties in Interest.***

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**Brief of Real Parties in Interest**

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QUESTION PRESENTED

Should this Court overturn a judgment barring the extradition of a party who, as a matter of law, cannot be validly charged with the offense for which his extradition is sought?

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NO. 86-381

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1986

PEOPLE OF THE STATE OF CALIFORNIA, )

Petitioner, )

vs. )

Superior Court of the State of )  
California, For the County Of )  
San Bernardino, )

Respondent, )

RICHARD SMOLIN AND GERARD SMOLIN, )

Real Parties in Interest. )

BRIEF OF REAL PARTIES IN INTEREST

STATEMENT OF THE CASE

Richard and Judith Smolin were divorced  
in 1978 by the San Bernardino Superior Court  
in California. Judith was given custody of  
their two children, with reasonable

visitation rights granted to Richard, who has remained a California resident since that time. As part of the dissolution agreement Judith agreed not to take the children from California without the consent of Richard.<sup>1</sup>

After remarrying, Judith violated the dissolution agreement by removing the children to Oregon without notice to Richard. During the next two years she moved the children from Oregon to Texas, then from Texas to Louisiana, each time concealing their location from Richard for varying

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<sup>1</sup>/See Joint Appendix (Jt. App.) at 62. The Joint Appendix, at pages 60-98, contains the opinion of the California Court of Appeal, Fourth Appellate District, Second Division, issued on February 25, 1986 in In Re the Marriage of Smolin, E001146. This opinion was cited in the opinion of the California Supreme Court, reported at 41 Cal.3d 758, 716 P.2d 991 (1986), which appears in Appendix A to the Petition for Certiorari (Pet. App. A).

periods of time, thereby frustrating his visitation rights.<sup>2</sup>

In 1980, Richard moved for and obtained a joint custody order from the San Bernardino Superior Court,<sup>3</sup> the only judicial forum empowered to modify the 1978 custody decree (see Argument III, infra). When Judith refused to honor the specific visitation rights provided to Richard in that joint custody order, on February 27, 1981, Richard obtained from the same court an order granting him sole custody of his children (Pet App. A at 3; Jt. App. at 64-65). Judith was personally served in both of these

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<sup>2</sup>/See Jt. App. at 62.

<sup>3</sup>/This order was referred to by the California Court of Appeal, Fourth District, Second Division, in its decision of March 26, 1985, ordering the extradition of the Smolins, which is Appendix B to the Petition for Writ of Certiorari (Pet. App. B). See Pet. App. B at 3.

modification proceedings (Pet. App. A at 3-4; Pet. App. B at 3).

For almost two years after obtaining sole custody of his children, Richard was unable to locate them: Judith had moved them from Texas to Louisiana without informing Richard of their whereabouts (Jt. App. at 62-66). After Richard learned their location and began to write and call them, Judith and her new husband, James Pope, filed a Louisiana adoption action aimed at severing Richard's parental rights (Jt. App. at 66). That action later was found by a judge to verge "on the fraudulent"; a fair characterization, as Judith represented in the adoption proceeding that Richard had no interest in supporting and establishing communications with his children, and "yet the history of this case shows that interest was always there." (Jt. App. at 51-52.)

On March 9, 1984, confronted with the possibility that his relationship with the children he loved might be declared a legal nullity, and "armed with the latest California custody order, Richard and his father, Gerard [hereafter "the Smolins"], 'picked up' the children at a school bus stop in Louisiana and brought them back to California" (Pet. App. B at 4).

On April 11, 1984, Judith submitted to the jurisdiction of the San Bernardino Superior Court, and filed a motion to modify the court's 1981 order granting Richard sole custody of Jennifer and Jamie Smolin (Pet. App. A at 7; Jt. App. at 69-70). Despite this recognition of the existence of the California order granting full custody of the children to Richard, on April 30, 1984, Judith swore under penalty of perjury before a judge in Louisiana that on March 9, 1984

"Richard Smolin and Gerard Smolin [had been] without authority to remove children from affiant's custody" (Pet. App. B at 6). That affidavit, which accompanied and served as the basis for Governor Edwards' demand for the Smolins' extradition, never mentioned the California decrees under which Judith received custody of Jennifer and Jamie in 1978, nor the 1980 and 1981 modification orders granting Richard joint, and then sole, custody of his children (id.).

On May 31, 1984, the San Bernardino Superior Court denied Judith's motion to modify custody and reaffirmed its 1981 order granting Richard sole custody of his

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children.<sup>4</sup> Two weeks later, Governor Edwards executed his requisition demand for the arrest and extradition of the Smolins based on the aforementioned affidavit of Judith which falsely claimed Richard had no authority to take custody of his children (Pet. App. B at 5-6). On August 23, 1984,

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4/It was this order, as well as the file on which it was based, which the same court judicially noticed on August 24, 1984, in granting the Smolins a writ of habeas corpus barring their extradition to Louisiana (Jt. App. at 47-52). Judith's appeal of this reaffirmation of the 1981 custody order produced the appellate decision contained in the Joint Appendix at 60-98. On appeal, Judith argued: a) that the 1981 sole custody order was invalid at the time it was issued; and b) that the Superior Court should not have reaffirmed that order in May of 1984. The Court of Appeal explicitly found that the 1981 sole custody order was valid (Jt. App. at 70-84), a fact omitted from the state's brief. It then proceeded to consider "the order of May 31, 1984, 'reaffirming' the sole custody in Richard which was granted under the order of February 27, 1981" (id. at 84). It reversed and remanded that order, directing the trial court to consider whether a joint custody order would be more appropriate (id. at 97-98).

Governor Deukmejian of California issued extradition warrants against the Smolins (Pet. App. B at 6).

On August 24, 1984, the San Bernardino Superior Court issued a writ of habeas corpus barring the extradition of the Smolins (Jt. App. at 47-52). That order was overturned reluctantly by the California Court of Appeal. Although believing itself powerless to do other than surrender the Smolins to Louisiana, the majority commented:

We remain curious as to why Governor Deukmejian's office has apparently declined to inform the Louisiana authorities about the latest California award of custody in a proceeding in which Judy personally participated. If there has been such transmission of information, our perplexity yet remains over what good purpose would be served in pursuing this matter as a criminal case. Certainly real parties acted rashly, but to put them through a criminal trial when, on all the facts,

it seems apparent that no crime has been committed suggests to us a perversion of the federal system.

(Pet. App. B at 18, emphasis in original.)

On May 1, 1986, the California Supreme Court overturned the Court of Appeal decision and barred the extradition of the Smolins. The Court recognized that it could not make a general inquiry into the Smolins' guilt or innocence (Pet. App. A at 18). The Court quite sensibly noted, however, that the obvious innocence of the Smolins should not serve to defeat an otherwise well-founded challenge to their extradition (*id.* at 19). Taking judicial notice of the California decisions in the Smolin custody matter, the Court found the Smolins were charged in the extradition papers with kidnapping children of whom Richard was legal custodian. Since those allegations do not state a crime under

Louisiana law, the Court concluded the Smolins were not substantially charged and could not be extradited.

#### SUMMARY OF ARGUMENT

Petitioner, the People of the State of California (hereafter "state"), seeks from this Court an order that Richard Smolin and his father Gerard be extradited from California to Louisiana to face charges of kidnapping. The conduct charged in the extradition papers is not in dispute: on March 9, 1984, the Smolins picked up Richard's children, Jennifer and Jamie, at a bus stop in St. Tammany Parish, Louisiana, and returned them to California. That act did not constitute a crime under Louisiana law because Richard had sole custody of his children at the time. It was for that reason that in 1986 the California Supreme Court

barred the Smolins' extradition in the decision now challenged by the state.

The issue of the legality of the Smolins' conduct in Louisiana is one of law. The facts that the Smolins took custody of the children in March of 1984 and that Richard at that time possessed a 1981 California order granting him sole legal and physical custody of his children are not now, nor could they ever be, reasonably in dispute. The three questions critical to the disposition of the kidnapping charges against the Smolins can and must be answered solely by reference to one corpus of law or another: (1) can the sole legal custodian of the children commit the crime of kidnapping them, as that crime is defined by relevant Louisiana statutes; (2) was Richard Smolin's custody decree valid under California statutory and decisional law; and, (3) if the

decree was valid, does the Parental Kidnapping Prevention Act of 1980 (28 U.S.C. §1738A) require Louisiana to recognize it?

Although the law of extradition concededly reserves the resolution of nearly all disputed issues in a criminal proceeding to the courts of the demanding state, the legal question of whether charged conduct constitutes a crime in the state seeking extradition has long been deemed one that can be decided in the asylum state. The unique interplay of state and federal law in the present matter rendered it not only permissible but highly desirable that the question of the legality of the Smolins' actions in Louisiana be confronted in California, for it was only in California that the validity of Richard's custody decree, the key to the case, could be meaningfully reviewed. Furthermore, without

doing violence to well-established principles of extradition law, the decision of the California Supreme Court barring the Smolins' extradition protected the integrity of that state's judicial processes, since extradition would have required reliance on an affidavit of Richard's ex-wife containing demonstrably false statements. Finally, affirmance of the decision below would be both legally correct and eminently just, avoiding an extradition described by one lower court as abhorrent and "a perversion of the federal system" (Pet. App. B at 16, 18).

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## ARGUMENT

## I

THE SMOLINS WERE ENTITLED TO  
CHALLENGE THEIR EXTRADITION IN  
THE COURTS OF CALIFORNIA ON THE  
GROUND THAT THEIR ALLEGED  
CONDUCT IN LOUISIANA DID NOT  
CONSTITUTE A CRIME UNDER THE  
LAWS OF THAT STATE BECAUSE  
RICHARD SMOLIN WAS THE SOLE  
LEGAL CUSTODIAN OF HIS CHILDREN  
IN MARCH OF 1984

All parties to this action agree that an individual is entitled to judicially challenge his impending extradition on the ground the extradition documents themselves establish, as a matter of law, that he cannot be validly charged and convicted of the crime of which he is accused in the demanding state. See Brief for Petitioner (Pet. Brief) at 28, citing Roberts v. Reilly, 116 U.S. 80, 95 (1885) (issue of substantial charge under laws of demanding state "is a question of law and is always open upon the face of the

papers to judicial inquiry on an application for a discharge under a writ of habeas corpus").<sup>5</sup> See also Michigan v. Doran, 439 U.S. 282, 288-89 (1978) (On habeas corpus, court in asylum state may consider "whether the petitioner has been charged with a crime in the demanding state. . . .").

Thus the state has no quarrel with the holdings of two cases relied on by the California Supreme Court in barring the Smolins' extradition (Pet. Brief at 36-38). In People ex rel. Lewis v. Commissioner of Correction, 100 Misc. 2d 48, 417 N.Y.S.2d 377 (1979), aff'd, 75 App.Div. 526, 426 N.Y.S.2d

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<sup>5</sup>/The Uniform Criminal Extradition Act, to which both California and Louisiana subscribe, also requires that an extradition demand be accompanied by documents which substantially charge a crime under the law of the demanding state. (Pet. App. A at 14-15.)

969 (1980),<sup>6</sup> Alabama sought the extradition of the petitioner from New York, alleging certain conduct as the basis for a charge of violating Alabama's securities fraud law. The petitioner contended his alleged conduct did not constitute an offense in Alabama; New York authorities replied that such an inquiry was foreclosed in the asylum state. Lewis held that the courts of New York had the power and obligation to inquire whether the petitioner's alleged behavior violated Alabama's criminal statutes, placing on the alleged fugitive the burden of conclusively establishing that "statutes or decisional law of the demanding state do not establish the act as criminal." 417 N.Y.S.2d at 345.

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<sup>6</sup>/Lewis and Application of Varona, *infra*, were cited by the California Supreme Court in its opinion below (see Pet. App. A at 20-21).

In Application of Varona, 38 Wash.2d 833, 232 P.2d 923 (1951), California had charged the petitioner with theft from a business entity in which he was a partner. Taking into consideration California caselaw from which "[i]t appears to be the settled law of the state of California that a partner cannot be found guilty of theft of the funds of the partnership of which he is a member", the Washington Supreme Court held that the petitioner was not substantially charged with a crime in the extradition papers and denied extradition.<sup>7</sup> Id. at 24.

The state thus agrees that extradition may be successfully challenged in the courts of the asylum state when the requisition documents themselves allege or reveal facts

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<sup>7</sup>/The Varona type of analysis has been employed in extradition cases for over a hundred years. See Scott, The Law of Interstate Rendition (Extradition) (1917), at 235-50.

which establish that the alleged fugitive has committed no crime under the decisional and statutory law of the demanding state. There is and can be also no dispute between the parties that the crime of which the Smolins are charged in Louisiana -- the kidnapping of Richard's children -- cannot be committed by a parent "to whom custody has been awarded by any court of competent jurisdiction of any state," since the crime is defined as the taking of children from their legal custodian. See Louisiana Revised Statutes (hereafter R.S.A.) §14.45(4).<sup>8</sup>

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<sup>8</sup>/Louisiana decisional law also unquestionably establishes that if Richard Smolin could not kidnap his children due to his status as their legal custodian, his father did nothing illegal in assisting Richard in taking custody of the children. State v. Elliot, 171 L.A. 306, 311, 131 So. 28, 30 (1930) ("Where a father is entitled to the possession of his minor child against all the world except its mother, and where the father (footnote cont.)

The parties also apparently agree that had the Louisiana extradition papers mentioned the California custody decrees of 1978, 1980, and 1981, the California courts could have considered those decrees in determining, as a matter of law "upon the face of the papers," whether the Smolins were substantially charged with a crime in the demanding state. Those decrees, of course, were the heart of the Smolins' claim against their extradition. If they were properly before the California courts, then those courts were constitutionally free to consider the entirety of the Smolins' argument that they were not "substantially charged" with a crime in Louisiana, and to bar extradition if

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8. (Cont.)

and mother are equally entitled to its possession, he does not commit the crime of kidnapping by taking possession of it . . . Nor is a person who assists the father under such circumstances guilty of the crime....").

under California law the decrees established Richard's status as sole custodian of his children in March of 1984.

The papers, however, did not mention either the 1978 California decree or the 1980 and 1981 modifications of it. Instead, they contained Judith's sworn statement, dated April 30, 1984, that Richard had had no authority to take custody of the children in Louisiana; a statement Judith clearly knew was false at the time she made it.

We therefore turn to the principal issue in this case: whether Richard Smolin's 1981 California order granting him sole custody of his children was properly considered by the California courts through the device of judicial notice. Once they demonstrate that consideration of the decree was proper, the Smolins can readily establish that they were

not substantially charged with an offense in Louisiana.

## II

### THE CALIFORNIA COURTS ACTED CORRECTLY IN TAKING JUDICIAL NOTICE OF THEIR OWN ORDERS IN DECIDING WHETHER THE SMOLINS WERE SUBSTANTIALLY CHARGED UNDER THE LAWS OF LOUISIANA

As noted above, the state does not challenge the right of the California courts to "entertain the issue of whether the person [whose extradition is being sought] is 'charged' with a crime. . . ." (Pet. Brief at 20). Rather, its sole objection to the decision below is that in "entertaining" that issue the California courts took "judicial notice of evidence extrinsic to the extradition documents, albeit evidence within [their] own files. . . ." (id. at 22). According to the state, "the inquiry on this issue may not go beyond the face of the

extradition documents" (id. at 28-29, footnote omitted).

The state is forced to admit, however, that the determination of whether an alleged fugitive has been substantially charged always roams beyond the extradition documents, in that such an inquiry necessarily requires information not found in those documents: the law of the demanding state. The state thus concedes that a court in an asylum state is empowered to utilize the device of judicial notice in deciding whether conduct alleged in extradition papers constitutes a crime in the demanding state.

That a court may judicially notice the law of the demanding state in determining if the fugitive is substantially charged is not disputed.

(Pet. Brief at 36-37, emphasis in original.)

Having conceded that it is proper for an asylum state to take judicial notice of the

"law" of the demanding state, it appears that the state would agree that if a Louisiana domestic relations decision established that Richard Smolin was the legal custodian of his children on March 9, 1984, the California courts could have taken judicial notice of that order, and determined that the Smolins were not and could not be substantially charged with kidnapping them. The question on which the parties to this action part ways is whether California's courts must ignore their own lawful orders in addressing the same issue.

The gist of the state's argument appears to be that in noticing statutes or judicial decisions of the demanding state, the courts of an asylum state are properly confining themselves to questions of law (Pet. Brief at 36-37); but that taking judicial notice of legal judgments of the asylum state

constitutes an inappropriate consideration of "extrinsic evidence" of a fact (id. at 37-38).

In Lewis and Varona, which the state cites with approval, the courts of asylum states took judicial notice of the existence, as well as the content, of certain statutes and judicial decisions of the demanding state.<sup>9</sup> There is no functional difference

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<sup>9</sup>/To cite another example, in Contreras v. State, 587 S.W.2d 723 (Tex. Crim. App. 1979), Texas prohibited the extradition of an alleged fugitive to Mississippi because the supreme court of Mississippi had recently declared unconstitutional the statute under which the fugitive was charged. In so doing, Texas took judicial notice of a fact -- that the relevant decision had been rendered -- as well as of the law the Mississippi supreme court's opinion contained.

between the noticing by an asylum state of the law of a demanding state and its taking judicial notice of its own decisional law and statutes. If the first type of notice involves only issues of law, as the state contends, so does the second.

The use of judicial notice by the California courts in this matter was fully consistent with this Court's decision in Michigan v. Doran. Doran recognized that a court of an asylum state hearing a challenge to an extradition order may consider "whether the petitioner has been charged with a crime in the demanding state" (439 U.S. at 288-89), because the resolution of this issue turns on "historic facts readily verifiable". Id. The taking of judicial notice fits neatly within the Doran framework as this evidentiary device is applied to factual matters "(1) generally known within the

territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Federal Rules of Evidence, Rule 201(b).<sup>10</sup> If, as Doran clearly implies, an asylum state court can take notice of the law of a demanding state because the existence and content of that law is "readily verifiable," an asylum state court no doubt can take notice of its own legal judgments, which are all the more "readily verifiable."

Doran also deemed it appropriate that asylum states conduct factual inquiries on the issues of identity and fugitivity. 439 U.S. at 288-89. Adjudication of either of

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<sup>10</sup>/See also Cal. Evid. Code §452(h) (allowing notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy").

these issues requires the admission of evidence, at times voluminous, outside the extradition papers. See, e.g., In Re Rowe, 67 Ohio St.2d 115, 423 N.E.2d 167 (1981) (petitioner produced and examined fourteen witnesses in an attempt to establish nonfugitivity).<sup>11</sup> Yet, as was noted in Doran: "There is nothing to indicate that this type of routine and basic inquiry has led to frustration of the extradition process." Id. at 296-97 n.7 (Blackmun, J., concurring). The extremely narrow inquiry undertaken below by the California courts, limited to the face of the extradition

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<sup>11</sup>/Moreover, judicial notice has been utilized in extradition cases in which identity or non-fugitivity has been at issue. For example, in Hogan v. Buerger, 647 S.W.2d 211, 215 (Mo. App. 1983), the court took judicial notice of the distance between two states and the unavailability of airline flights in concluding that the petitioner had not been in the demanding state at the time of the alleged offense.

documents and the law and legal judgments of the demanding and asylum states, threatens far less disruption of the extradition process than the fact-intensive investigations of identity and fugitivity sanctioned by Doran.

The state also argues that, in holding the alleged conduct of the Smolins did not constitute a crime, the judgment below is nothing but a disguised "determination on the ultimate issue of real parties' guilt or innocence" (Pet. Brief at 49), in violation of the fundamental principle of extradition law "that the asylum state may not inquire into the guilt or innocence of the accused or consider any affirmative defense to the crime" (id. at 30).

Yet evidence of mistaken identity or non-fugitivity, while introduced to prove one fact, equally proves another: innocence of

the crime charged. See, e.g., Hyatt v. Corkran, 188 U.S. 691, 719 (1903) (petitioner, by proving he was not in demanding state at time of alleged crime, established he was not a fugitive subject to extradition). The fact that evidence admitted for a purpose proper under extradition law also tends to prove innocence does not prohibit its consideration.<sup>12</sup>

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<sup>12</sup>/The California Supreme Court acknowledged that, as in the areas of identity and non-fugitivity, permissible inquiry into whether an alleged fugitive is "substantially charged" inevitably impinges on, but is not coextensive with, the issue of guilt or innocence:

It would ordinarily follow from the fact that a crime was not substantially charged that the person against whom the attempted charge was made was not guilty of its commission. But the converse, of course, is not true: from the fact that a person may be found not guilty of a crime it does not follow (footnote cont.)

Finally, the state asserts time and again that the decision of the California Supreme Court is unprecedented. It is not. In Ex Parte Efner, 322 S.W.2d 285 (Tex. Crim. App. 1959), a mother was charged with kidnapping a child over whom the asylum court had granted her custody prior to the date the crime was alleged to have occurred. Taking notice of the decree, the Texas court found the petitioner had not been charged with conduct constituting a crime in the demanding state and blocked her extradition. See also Ex Parte Kelsey, 19 N.J.Misc. 488, 21 A.2d 676 (N.J. Super. Ct. 1941); Hard v. Splain, 45 App. D.C. 1 (1916).

The parties agree that the issue of whether the Smolins were substantially

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12. (Cont.)

that the crime itself was not substantially charged.

(Pet. App. A at 19 n.8.)

charged was one of law, and had to be disposed of without the introduction of external evidence relating to a factual defense. The issue of whether Richard was his children's legal custodian on March 9, 1984 was also one of law, however. The use of judicial notice to bring before a court deciding the issue of "substantial charging" legal orders relevant to that question was entirely within the limited scope of extradition proceedings.

### III

WHEN READ IN LIGHT OF RELEVANT  
LOUISIANA AND CALIFORNIA LAW,  
THE EXTRADITION DOCUMENTS  
ESTABLISHED THAT THE SMOLINS  
COMMITTED NO CRIME IN LOUISIANA

Having taken notice of their own records and judicial orders concerning custody of the Smolin children, the California courts found that Richard Smolin was the sole legal custodian of his children in 1984 and thus

could not be charged under Louisiana law with kidnapping them. It is obvious that if Richard Smolin was the valid legal custodian of his children in 1984 he committed no crime in returning them to California. While challenging the right of the California courts to take notice of Richard's 1981 sole custody decree, the state has declined to challenge the ruling below that the 1981 decree established Richard's right to sole custody of his children.<sup>13</sup>

Nonetheless, on the basis of a discussion (Pet. Brief at 38-45)

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<sup>13</sup>/"Petitioner is not now challenging the California custody order relied upon by real party Richard Smolin. Indeed, petitioner certainly recognizes California's interest in protecting and upholding its custody orders" (Pet. Brief at 44).

The dissenting opinion in the California Supreme Court also noted that on March 9, 1984 Richard had a valid sole custody order. (Pet. App. A, Lucas dissenting, at 11 n.4.)

characterized by a generous disregard for child custody law, the state suggests "that the matter of Richard's defense to the Louisiana charge is subject to dispute." (Pet. Brief at 44-45.) As can be readily demonstrated, under controlling state and federal law there can be no such dispute.

The records of the San Bernardino Superior Court which were judicially noticed in this matter establish that court issued the Smolins' original divorce decree in 1978. Under the Uniform Child Custody Jurisdiction Act (UCCJA),<sup>14</sup> to which both Louisiana<sup>15</sup> and California subscribe, California thus maintained exclusive continuing jurisdiction to modify the 1978 order.

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<sup>14</sup>/See U.L.A., Master Edition, Volume 9.

<sup>15</sup>/See, e.g., Wachter v. Wachter, 439 So.2d 1260 (La. App. 5 Cir. 1983).

"Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside."

Bodenheimer, "Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA," 14 Fam. L.Q. 203, 214-15 (1981) (hereafter "Bodenheimer"), cited with approval in Kumar v. Superior Court, 32 Cal.3d 689, 696 (1982).<sup>16</sup>

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<sup>16</sup>/See also Jt. App. at 75-76. The state is thus, quite simply, dead wrong in asserting that under the UCCJA: "There is no doubt that concurrent jurisdiction can exist in more than one state at a given time to render orders regarding the custody of children." (Pet. Brief at 39.) As Professor Bodenheimer, reporter for the special committee which drafted the UCCJA, has stated:

(footnote cont.)

Federal law is to the same effect.

Under the terms of the Parental Kidnapping Prevention Act of 1980, the state that issues an original child custody decree retains exclusive jurisdiction to modify that decree as long as one of the parties to the decree continues to reside in the state. 28 U.S.C.

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17. (Cont.)

[T]he continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's continuing jurisdiction . . . Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.

Id. (Emphasis in original.)

§1738A(d).<sup>17</sup> Thus, Richard's 1981 sole custody order is binding on, and must be judicially noticed by, all other states (see

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17/28 U.S.C. §1738A(d) provides:

The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(Emphasis added.) Subsection (c)(1), to which section 1738A(d) makes reference, provides that, "[a] child custody determination made by a court of a State is consistent with the provisions of this section only if . . . such court has jurisdiction under the law of such State...."

Pet. App. A at 31-33).<sup>18</sup> California, and California alone, had the power to modify the 1978 order giving Judith Smolin Pope sole custody of her children.<sup>19</sup>

Modifications occurred in 1980 and 1981, when Richard was given first joint, and then sole custody of his children by the San

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18/Even were this Court to hold that Louisiana rather than California must ultimately rule on the validity of the charges against the Smolins, this Court's opinion should provide guidance to the courts of Louisiana regarding the effect of 28 U.S.C. §1738A on the criminal charges lodged against the Smolins. To decline that opportunity now might mean that this Court would confront the same federal law question after this matter has wound its way through the entire Louisiana judicial system, a devastating prospect for the two innocent men now before this Court.

19/As the extradition papers alleged, Judith obtained a 1981 Texas sole custody decree, which merely gave full faith and credit to her 1978 California custody order. The Texas decree thus was founded on the original California order and, under both the UCCJA and PKPA, could and did not affect the exclusive right of California to modify the 1978 decree.

Bernardino Superior Court. As the California Supreme Court pointed out, the 1981 sole custody decree had not been challenged when Richard picked up his children in Louisiana in 1984 (Pet. App. A at 29). Judith later personally appeared and challenged the validity of both the 1981 decree, and a 1984 order reaffirming it, in the California Courts of Appeal. While, in this proceeding, Judith won the opportunity to seek modification of Richard's status as sole custodian of their children, her claim that the 1981 decree was jurisdictionally invalid was rejected (Jt. App. at 71-84). Judith did not exercise her right to appeal this ruling to either the California Supreme Court or to this Court. The matter is thus settled:

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Richard Smolin was his children's sole legal custodian in March of 1984.<sup>20</sup>

Since, to paraphrase the Louisiana

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<sup>20</sup>/The state's treatment of the California appellate decision of February 25, 1986 in the Smolin civil case (Jt. App. at 60-98) is inexplicable. The state relies on language in the opinion to suggest that there may yet be grounds upon which to challenge Richard's 1981 sole custody decree (Pet. Brief at 38-44), yet never mentions that the very opinion it cites considered and rejected every argument raised against the decree's validity, thereby affirming that Richard was his children's sole legal custodian from February of 1981 through March of 1984 (Jt. App. at 70-84). The state's argument makes no more sense than would citation to this Court's decision in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), to demonstrate the continuing vitality of the argument of John W. Davis that "separate but equal" educational facilities are constitutional.

Furthermore, the factual basis for the state's suggestion that there might be a problem with Richard's 1981 decree -- that in moving in 1980 for modification of the 1978 decree Richard did not "advise the [San Bernardino Superior] court of [Judith's] pending proceedings in Texas" -- is incorrect. Richard's declaration in support of his motion for modification, which was filed on (footnote cont.)

kidnapping statute, the San Bernardino Superior Court is a "court of competent jurisdiction of any state," since California's courts have declared that Richard Smolin had been validly granted custody of his children from 1981 through 1984, and since federal law requires that the 1981 California decree be respected by

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20. (Cont.)

October 3, 1980, included the following statement:

Respondent [Judy] has initiated proceedings in the District Court in Dallas County, Texas, to give full faith and credit to the modification of the Interlocutory Judgment dated August 6, 1979 in the Superior Court of the State of California for the County of San Bernardino.

(CT at 37.) The file of the child custody proceedings which contains this declaration was made part of the record of the present matter through the taking of judicial notice by the San Bernardino Superior Court (Jt. App. at 47).

Louisiana,<sup>21</sup> the judgment below that the extradition papers in this matter do not allege conduct by the Smolins constituting a crime in Louisiana was plainly correct.<sup>22</sup>

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21/The operation of the federal statute provides another reason why the issue of the existence and validity of Richard's custody decree should have been open to litigation in California. Were the Smolins extradited, the Parental Kidnapping Prevention Act's "full faith and credit" clause would bar any collateral attack on Richard's 1981 decree in Louisiana. Under the federal statute, the only state that could entertain such an attack would be the state that issued the decree -- California. Had there been a defect in the decree, only a California court could have declared its existence. It therefore was in Louisiana's interest, as well as Richard Smolin's, to have the 1981 decree placed at issue in a California court.

22/Despite declining to challenge Richard's 1981 sole custody decree, the state chooses to cast gratuitous aspersions at both it and Richard himself. For example, it states that by "abducting and removing" Jennifer and Jamie from Louisiana, thereby "successfully transferr[ing] the forum for the custody dispute to California," the Smolins acted "contrary to the spirit and purpose (footnote cont.)"

## IV

AS WITH ANY TYPE OF JUDICIAL ACTION,  
A COURT DECIDING AN EXTRADITION MATTER  
MUST BE EMPOWERED TO PREVENT FRAUD

underlying both the PKPA and the UCCJA" (Pet. Brief at 48). That statement betrays a profound misunderstanding of the purpose and function of those two laws. They are designed to prevent a parent from taking children out of the state that issued an original custody decree in the hope of obtaining a more favorable decree elsewhere. Both laws achieve that objective by requiring all states to defer to the "exclusive continuing jurisdiction" of the state of the initial decree. See Bodenheimer, supra. In this case, it was Judith Smolin Pope who offended the "spirit and purpose" of the UCCJA and PKPA by taking the Smolin children from California in violation of the initial custody agreement (Pet. App. at 62), by filing custody actions in Texas and Louisiana, the latter an adoption action "verging on the fraudulent" (Jt. App. at 51), and by refusing to appear in California in the 1980 and 1981 modification proceedings, despite having been properly served.

The state also accuses the Smolins of "vigorously and consistently" refusing to do legal battle on any but their own turf -- i.e., California (Pet. Brief at 48). That broadside ignores the fact that both the UCCJA and PKPA mandate that any litigation over the custody of the Smolin children be conducted in California, the state of the initial custody decree.

By the time the San Bernardino Superior Court confronted the Smolins' petition to block their extradition in August of 1984, it knew the affidavit accompanying the requisition papers was, at best, grossly misleading and, at worst, perjurious. That affidavit by Judith Smolin Pope stated that Richard and Gerard, in March of 1984, were without legal authority to take custody of Jennifer and Jamie, yet months before Judith had recognized Richard's 1981 sole custody order by filing, and losing, a challenge to it in the very court confronted with her

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sworn statement that no such decree existed.<sup>23</sup>

To create an unlimited "fraud" exception to the ban in extradition proceedings on full fledged inquiries into guilt and innocence admittedly would be unwieldly: any defendant could delay extradition by demanding a full evidentiary hearing on his claim that the allegations against him were based on perjured testimony. The spectre of such procedural gamesmanship is in no way raised by the opinion below, however. If a defendant's claim of fraud requires the taking of testimony or the resolution of

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<sup>23</sup>/The state defends Judith's failure in her affidavit of April 30, 1984 to mention Richard's 1981 decree, of which she was concededly aware, on the ground that in 1980 Judith's Texas lawyer told her that any California order was unenforceable (Pet. Brief at 55). The mere suggestion by the state that a party may disregard a lawful court order whenever a lawyer advises her that she is free to do so is astounding.

evidence in conflict, he must be relegated to the remedies available in the courts of the demanding state. On the other hand, no court should be obligated to issue an order which its own records reveal would promote fraud.<sup>24</sup> That is the extraordinary situation in which the San Bernardino Superior Court found itself. The California courts acted correctly in refusing

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<sup>24</sup>/The application of generally sound procedural rules is suspended where, as in the present case, their use would perpetuate an act of fraud. To cite an example arising out of a federal context parallel to that of extradition, that of sister state judgments, the full faith and credit clause of the United States Constitution bars collateral attacks on the validity of the judgment of one state when a party seeks to give that judgment effect in the courts of another state. Durfee v. Duke, 375 U.S. 106, 111 (1963). That rule applies, however, only "in the absence of fraud" id. at 191 (emphasis added). See also Craig v. Superior Court, 45 Cal.App.3d 675, 680 (1975) (defendant allowed to attack foreign judgment on ground it is "affected with fraud").

extradition in this highly unusual set of circumstances.<sup>25</sup>

## V

THE DECISION BELOW IS LIMITED  
TO ITS FACTS AND WILL HAVE NO  
APPRECIABLE IMPACT ON THE LAW  
OF EXTRADITION

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The decision of the California Supreme Court does not broaden the permissible scope of extradition proceedings. Its significance lies only in the justice it so obviously worked in the unique circumstances of the Smolins' case.

The opinion below specifically holds that an extraditee may not challenge his extradition from the asylum state on the ground that he did not commit the act or

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<sup>25</sup>/It also may be argued that a demanding state's right under the federal constitution to the production by an asylum state of an alleged fugitive is weakened, if not nullified, by the reliance of its extradition demand on a demonstrably false affidavit.

possess the state of mind required to commit the charged offense (Pet. App. A at 19). It does not approve the introduction of any form of evidence other than that of court orders which can be judicially noticed, and are thus "historic facts readily verifiable."

Michigan v. Doran, 439 U.S. at 289.

The state argues that the opinion below will enable those accused of stealing automobiles, rape, or bigamy to resist extradition by claiming they possess certificates of ownership or marriage licenses. (Pet. Brief at 53-54.) The analogy is false, since the simple existence of such certificates or licenses, which can be fraudulently obtained, cannot conclusively establish ownership or marital status. The true analogy would be to a party who fairly litigates his right to an automobile in state A. After losing his suit, he travels to

state B and swears out a false affidavit in support of extradition to the effect that his legal adversary, rather than gaining the car in question through a valid court order of state A, stole it from the declarant while in state B. It is only in such an extraordinary situation that the opinion below could be invoked, allowing the courts of state A to prevent a blatant fraud and miscarriage of justice by reference to their own, final order. This Court need have no quarrel with that result.

#### CONCLUSION

It is undisputed that in extradition proceedings an asylum state court may judicially notice the statutes and decisional law of the demanding state in order to determine whether an extraditee has been substantially charged with a crime. Logic and the efficient administration of justice

require that the asylum state should likewise be permitted to take judicial notice of its own laws when they are relevant to the determination of whether a crime has been substantially charged. Moreover, under the federal statutory framework that has been established to resolve disputes such as the one we have here, it is California law -- the very law of which judicial notice was taken in finding that a crime had not been substantially charged in this case -- that will ultimately be applied to resolve this matter.

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Real Parties in Interest urge this Court  
to affirm the California Supreme Court's  
opinion denying their extradition.

DATED: February 19, 1987

Respectfully submitted,

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(7)  
No. 86-381

Supreme Court, U.S.  
**FILED**

**FEB 20 1987**

JOSEPH E. SPANIO, JR.  
CLERK

# **In the Supreme Court**

OF THE  
**United States**

OCTOBER TERM, 1986

PEOPLE OF THE STATE OF CALIFORNIA  
*Petitioner,*

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
FOR THE COUNTY OF SAN BERNARDINO,  
*Respondent,*

RICHARD SMOLIN AND GERARD SMOLIN,  
*Real Parties in Interest.*

BRIEF FOR AMICI CURIAE  
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE  
and  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTEREST OF AMICI CURIAE

California Attorneys for Criminal Justice (hereinafter CACJ) is a California criminal defense bar comprised of 1,800 lawyers active in criminal defense and dedicated to the preservation and improvement of a fair criminal justice system within our country.

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 4,000 lawyers who are citizens of every state. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Supreme Court of California in People v. Superior Court (Smolin), 41 Cal.3d 758 (1986), approved of a habeas corpus court in an asylum state taking judicial notice of its own court records

to ascertain whether a person sought to be extradited by a sister state had been substantially charged with having committed a crime against her laws. In the case, the habeas court, by judicially noticing the existence of a valid custody decree granting respondent custody over his two children, determined that under the laws of the demanding state he could not properly be charged with kidnapping the two children, and granted respondent's request to halt his extradition.

CACJ and the NACDL, believing this to be a just result consistent with judicial precedent and the orderly prosecution of interstate crime, join respondents as amici to respectfully urge this Court to affirm the judgment of the Supreme Court of California.

#### SUMMARY OF ARGUMENT

This brief will assess the constitutionality of allowing an asylum court in extradition habeas corpus to go beyond the extradition documents by judicially noticing its own records in determining whether a person has been substantially charged with having committed a crime against the laws of the demanding state. The brief will show that this narrow inquiry has never been expressly forbidden by this Court and that the tribunals of several states have chosen to engage in similar analyses when confronted by like situations. It is the conclusion of amici that the inquiry is constitutional; the insignificant burdens on the swift rendition of fugitives resulting from engaging in it are outweighed by the benefits to be reaped from it.

## ARGUMENT

PERMITTING AN ASYLUM COURT TO TAKE JUDICIAL NOTICE OF ITS OWN RECORDS TO DETERMINE WHETHER AN ACCUSED PERSON IS SUBSTANTIALLY CHARGED A CRIME AGAINST THE DEMANDING STATE'S LAWS IS CONSTITUTIONAL AND THE RESULTING BURDENS ON THE PROCESS OF INTERSTATE EXTRADITION ARE VERY LIGHT

The Extradition Clause in the United States Constitution, art. IV, { 2, cl. 2, as implemented by Congress in Title 18 U.S.C. { 3182, and the Uniform Criminal Extradition Act, 11 U.L.A. 59 (1974), where enacted, have secured the states the absolute right to bring to trial within their boundaries persons charged with having committed a crime against their laws. A corollary to this right is the prohibition on an asylum state to conduct a trial on the merits

of the accused person's case and attempt to ascertain his or her guilt or innocence of the underlying offense. Drew v. Thaw, 235 U.S. 432, 439-40 (1914); Uniform Criminal Extradition Act { 20.

This Court in Michigan v. Doran, 439 U.S. 278 (1978), reiterated these salutary fundamental principles and delineated the limited scope of inquiry permissible by an asylum court when an alleged fugitive challenges her extradition in a habeas corpus proceeding:

[A] court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the

person named in the request for extradition; and (d) whether the petitioner is a fugitive.

Id., 439 U.S. at 289.

The prohibition against passing on the merits of the alleged fugitive's case is thus qualified by these four issues open to inquiry. Should a habeas court ascertain that the accused has established the absence of at least one of these four requirements, such as identity or fugitiveness, the fact that the court may also collaterally determine that the person is not guilty of the underlying charge is not a bar to preventing extradition. See, e.g., Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903) (approving state court determination that extradition should be blocked as petitioner demonstrated that he was not in demanding state at time alleged crime

occurred).

Regarding inquiry into the substantiality of the demanding state's charge, there will also invariably be instances when a determination that the accused person was not charged with a crime involves passing on issues close to the merits of his case. Ordinarily this would not be a valid objection to a refusal to extradite. Roberts v. Reilly, 116 U.S. 80, 95 (1885). The question presently before this Court is whether simple factual evidence may be admitted through judicial notice of the asylum court's records in ascertaining the substantiality of the demanding state's charge. While no United States Supreme Court cases have directly addressed this issue, we urge this Court to answer the question in the affirmative.

A. NO VALID CONSTITUTIONAL AUTHORITY  
COMPELS AN ASYLUM COURT TO CONFINE  
ITSELF EXCLUSIVELY TO THE FACE OF  
THE EXTRADITION DOCUMENTS  
ASCERTAINING THE  
SUBSTANTIALITY OF THE DEMANDING  
STATE'S CHARGE

In extradition habeas corpus the issues of identity and fugitiveness are ones of fact and thus evidence beyond the four corners of the extradition documents is admissible to attempt to prevent erroneous extraditions. Biddinger v. Commissioner of Police, 245 U.S. 128, 135 (1917). Contrary to the position of the State of California as petitioner in the present case, no persuasive authority supports its assertion that an asylum court must absolutely confine itself to the face of the extradition papers in determining the substantiality of the charge of the demanding state.

The only United States Supreme Court case which passed on the question as to what evidence is admissible on this issue is both ambiguous and of questionable continuing validity. In Roberts v. Reilly, 116 U.S. 80 (1885), the Court stated that the question whether a person is substantially charged with a crime is a question of law which is "always open upon the face of the [extradition] papers to judicial inquiry." Roberts, 116 U.S. at 95. In discussing the merits of the case, the Court rejected petitioner's claim that the indictment did not substantially charge larceny because it did not state that the corporation from whose possession the property was taken was capable of ownership under the law of the demanding state. This issue, the Court held

is not a matter of law  
arising upon the face of the

indictment, but can arise only at the trial upon the evidence, if the question should then be made. The averment in the indictment is the allegation of a fact which does not seem to be impossible in law, and is, therefore, traversable.

Id. at 96.

As the Supreme Court of California concluded, this holding appears to mean that the courts of the asylum state are foreclosed from inquiring whether the law of the demanding state renders the actions alleged in the indictment a crime. People v. Superior Court (Smolin), 41 Cal.3d 758, 769 n.12 (1986). Even the petitioner recognizes that this is not the law today. Brief for Petitioner at 36-38. Without the ability to engage in an inquiry into the demanding state's laws, a habeas court

would have no frame of reference in ascertaining whether the accused stands charged with a crime. See People ex rel. Lewis v. Commissioner of Correction, 417 N.Y.S.2d 377, 380 (1979) ("It is this court's opinion that it has the power and obligation to make an inquiry [as to whether the acts charged constitute a crime] if properly raised."). The Roberts case, therefore, was decided under a principle of law no longer valid and its appellation regarding making a determination confined to the "face of the papers" must be considered only dictum.

No other case from this Court has addressed the precise issue before this court. Biddinger v. Commissioner of Police, 245 U.S. 432 (1914), for example, only dealt with evidence which may be considered on the issue of fugitiveness, while cases such as Drew v. Thaw, 235 U.S. 432 (1914), Strassheim

v. Dailey, 221 U.S. 280 (1911) and South Carolina v. Bailey, 289 U.S. 412 (1933), merely reaffirmed the truism that the asylum state is not the locus to conduct a trial on the merits of the accused person's case.

This Court's latest cases on extradition law have also not passed upon the propriety of the inquiry in question here. Michigan v. Doran, 439 U.S. 282 (1978), held only that an asylum court may not re-examine a sister state's judicial determination of probable cause in the habeas proceeding; while in Pacileo v. Walker, 449 U.S. 86 (1980), the Court prohibited inquiring into the constitutionality of the demanding state's penal system as a ground for barring extradition.

Other lower court cases cited by petitioner for the proposition that an asylum court is strictly confined to the extradition papers are inapposite. See,

e.g., United States v. Flood, 374 U.S. 554 (2nd Cir. 1967) (persuasiveness of affidavit accompanying extradition warrant not proper subject for asylum court's determination).

B. TRIBUNALS IN SEVERAL STATES HAVE AUTHORIZED ACCEPTING SIMPLE FACTUAL EVIDENCE ON THE ISSUE OF WHETHER A PERSON IS SUBSTANTIALLY CHARGED WITH A CRIME.

While some states which have considered whether to go beyond the face of the extradition papers have refused to do so, see, e.g., Hopper v. State ex rel. Schiff, 678 P.2d 699 (N.M. 1984), others have permitted such inquiries, finding that doing so neither violated the Extradition Clause nor disrupted the summary nature of the rendition process.

The Supreme Court of Wisconsin, for example, in State v. Ritter, 246 N.W.2d

552 (Wis. 1976), analyzed the role of an asylum court when the alleged fugitive was charged with having committed a crime which, under the demanding state's laws, could only be charged if he was over 18 years old or if a demanding state juvenile court had first referred the case for adult prosecution. The petitioner sought to prove that the referral which had occurred was invalid and that he was under 18 years old and hence had not been properly charged with a crime. The Ritter court refused to assess the validity of the referral, believing it could not confidently resolve this difficult issue. The court did, however, expressly approve of going "beyond the face of the [extradition] documents and allow[ing] . . . evidence on a simple factual issue--age." Id. at 557. The court did not perceive that this narrow inquiry, which would aid its determination of the substantiality of

the charge, would in any manner disrupt the extradition process. The analysis permitted by Ritter was specifically approved by the Wisconsin Supreme Court under the strictures of this Court's opinion Michigan v. Doran in the case of State ex rel. Reddin v. Meekma, 306 N.W.2d 664 (Wis. 1981).

In State v. Gale, 312 S.W.2d 824 (Fla. App. 1975), a Florida appellate court analyzed a situation very similar to the one at bar and concluded that considering indisputable evidence beyond the face of the extradition papers was constitutional. The petitioner was sought by the demanding state for kidnapping children in violation of a custody order entered after his divorce. He attempted to show that he had not been substantially charged with a crime because he had remarried his wife subsequent to the decree and, in so doing, had invalidated the prior custody

order. The court rejected his argument, finding that he had not established that under the demanding state's laws remarriage vitiates a custody decree. Nonetheless, the court approved of petitioner's introduction of evidence regarding his remarriage. It is clear under the rubric of Gale that had the law of the demanding state been clear on the subject, as the law of Louisiana is in the present case, neither the traditional bar on inquiring into the merits of a case nor the limitation, argued by petitioner, of not going beyond the extradition papers, would have prevented the court from halting an erroneous rendition.

Further examples of cases, decided in modern times, in which courts have authorized the introduction of extrinsic evidence on the substantial charge issue can be found in Ohio and Minnesota. These states allow a petitioner to

introduce proof to show that he or she is not substantially charged because the underlying criminal charge is merely a subterfuge to enforce a civil liability. See State ex rel. Gilpin v. Stokes, 483 N.E.2d 179 (Ohio App. 1984), elaborating on the Ohio Supreme Court's announcement of the principle in Carpenter v. Jamerson, 432 N.E.2d 177 (Ohio 1982), and State ex rel. Walker v. Ramsey County District Court, 368 N.W.2d 28 (Minn. App. 1985).

Tribunals in Wisconsin, Florida, Ohio and Minnesota have all concluded that accepting simple factual evidence on the issue of substantiality of a charge does not offend either the well-known prohibition against passing on the guilt or innocence of the accused person's case or interstate harmony. The Supreme Court of California thus proceeded upon ground already charted by several courts in sanctioning judicial notice of a

court's own records in extradition habeas corpus.

C. PERMITTING AN ASYLUM COURT ON HABEAS CORPUS TO JUDICIALLY NOTICE ITS OWN RECORDS DOES NOT DISTURB THE SWIFT RENDITION OF FUGITIVES AND PREVENTS THE HARDSHIP AND SIGNIFICANT RESTRAINT ON LIBERTY WHICH RESULTS FROM ERRONEOUS EXTRADITION

No decision by this Court has directly prohibited the inquiry in question and several states have permitted it. The only question that remains is thus whether the California Supreme Court's decision is constitutionally infirm under the caveats regarding the potential "balkanization" of the administration of interstate criminal justice articulated by this Court's opinion in Michigan v. Doran, 439 U.S. 530 (1978).

The Doran court, in forbidding re-examination of a demanding state's probable cause determination, was driven by concerns that the individual states not become sanctuaries for fugitives from justice and that they not engage in inquiries which may unduly delay the summary rendition process. The California Supreme Court's opinion in Smolin avoids both these pitfalls.

Doran's first concern can be succinctly capsulized as the fear that asylum states may make errors in assessing a person's case, thus becoming unwitting sanctuaries. Smolin's inquiry would not result in these errors. In order for a court to judicially notice its own records, the high standards of certainty and indisputability contained in the state's rules for judicial notice must first be met. See, e.g., Fed. R. Evid. 201, from which many states' rules on judicial notice are derived (fact to be

noticed must be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") While the congruence between Doran's statement that the four issues which may be inquired into are "historic facts readily verifiable," Doran, 439 U.S. at 289, and the language of many statutes on judicial notice may be coincidental, there can be no doubt that the result of both is the same: only facts which will not result in error can be considered.

Errors in the proceeding are also minimized by the extremely high burden of proof imposed on the suspect in extradition habeas corpus. The burden is usually set at "clear and convincing" or "beyond reasonable doubt." See Murphy, Revising Domestic Extradition Law, 131 U. Pa. L. Rev. 1063, 1115-17 & n.268 (1983), for a comprehensive list of standards adopted by states.

The concerns regarding delay of extradition proceedings are also met by the Smolin inquiry. The very purpose of judicial notice is to expedite factual determinations where the particular fact to be proved is outside the subject of reasonable controversy. Accepting evidence of this simple nature, and only in the form of readily accessible records of the habeas court, is far less susceptible to delay than other inquiries expressly permitted by Doran. For example, the inquiry into a person's fugitiveness carries the potential for dilatory tactics by the accused. See, e.g., In re Rowe, 423 N.E.2d 167 (Ohio 1981) (petitioner on extradition habeas corpus allowed to examine fourteen witnesses and cross-examine two others to show non-fugitiveness). The Doran Court was cognizant of the potential for delay inherent in these inquiries but concluded that "[t]here is nothing to

indicate that this type of routine and basic inquiry has led to the frustration of the extradition process." Doran, 439 U.S. at 297 n.7 (Blackmun, J., concurring).

The combination of the strictures of judicial notice and the high burden of proof will operate to screen out of the system only a minute number of cases where, as in the present case, it is clear beyond question that an accused person has not been substantially charged with a crime. The only inquiry permissible is into the judicial act in the court record noticed, not the hearsay statements within it or other legal papers such as motor vehicle ownership certificates. Furthermore, the inquiry does not result in any appreciable delay in the extradition process as judicial notice by its nature involves a minimum of time and court resources. Doran's "balkanization"

concerns are avoided by the California Supreme Court's decision and hence, it is consistent with that opinion.

A comparison of the scanty interference caused by the judicial notice inquiry with the benefits to be reaped from it also compels the conclusion that permitting it is consistent with public policy. As delineated before, the swift rendition of fugitives will not be hindered and the benefits of the inquiry are substantial.

As extraditions considerably tax a state's resources, interstate harmony will probably be promoted by allowing the inquiry, since it is probable that if the demanding state had known of the insubstantiality of its charge it would place its resources in prosecuting meritorious cases. In this regard, the asylum courts operate as a valuable adjunct to the screening function of the executive officials in charge of the

bulk of the extradition process.

Allowing extraditions in situations such as Smolin is to condone and perpetuate the perpetration of fraud on the judicial system. Persons should not be allowed to abuse the criminal system by improperly prosecuting private grievances as in the present case. To allow them to do so would be to supply civil litigants with an unfair weapon in their disputes to the detriment of the efficient allocation of scarce prosecutorial and judicial resources. While an unlimited fraud exception to extradition would be neither practical nor wise, allowing a court to prevent extradition where its own records clearly indicate the underlying fraud is a salutary outcome.

The greatest benefit of allowing the judicial notice inquiry is that it prevents individuals from suffering the enormous financial and emotional burden

which can result from an erroneous extradition. It is no answer to this consideration that persons in the Smolins' shoes may avoid this detriment by simply waiving extradition and presenting their case in the demanding state; persons should no more have to waive the procedural protections of extradition than any other right in our constitutional system.

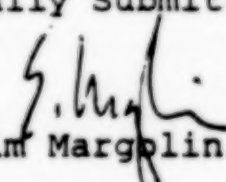
#### CONCLUSION

This Court is here faced with a situation not previously addressed in its previous articulation of the extradition system. The inquiry in question, rather than allowing "[t]he case to . . . be tried on habeas corpus," Strassheim v. Daily, 221 U.S. 280, 286 (1911) (Holmes, J.), only permits an asylum court to screen cases out of the system where, through the simple expedient of judicial notice of its own

records, it can confidently ascertain that the accused person has not been substantially charged with a crime.

The only real argument against this narrow inquiry is that, in assessing issues closely related to the merits of the alleged fugitive's case, it appears to run afoul of the historical taboo against an asylum court determining guilt or innocence. The notion that a "rule simply persists from blind imitation of the past," (O. Holmes, Collected Legal Papers 187 (1920)), has no place in this nation's criminal jurisprudence, and should not prevent this Court from permitting an inquiry salutious to the control of interstate crime.

Respectfully Submitted,

  
Ephraim Margolin

February 17, 1987